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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 640.

JOHN RUCH, PLAINTIFF IN ERROR,

vs.

THE CITY OF ROCK ISLAND.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED JANUARY 21, 1878.

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1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court rooms in the city of Chicago, in the district aforesaid, before the judges thereof, on Tuesday, the ninth day of November, in the year of our Lord one thousand eight hundred and seventy-five, and of our Independence the one hundredth year.

WILLIAM H. BRADLEY, *Clerk.*

JOHN RUCH
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NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that on the twenty-fifth day of September, A. D. 1872, came the said John Ruch, plaintiff, by Mess'rs Brackett and Waite, his attorneys, and filed in the office of the clerk of the circuit court of the United States for the northern district of Illinois at Chicago, in the district aforesaid, his bond for costs in said entitled cause,
2 which said bond is in the words and figures following, to wit:

Bond for costs.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court. July term, A. D. 1872.

JOHN RUCH
v.
THE CITY OF ROCK ISLAND. } In ejectment.

We enter ourselves security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action or to any of the officers of this court, and in default of payment by the plaintiff of any costs ordered or adjudged to be paid by him, hereby agree and stipulate that execution may issue against our property for any costs taxed against him.

Dated this 25th day of September, A. D. 1872.

BRACKETT AND WAITE.

(Endorsed:) Filed Sept. 25th, A. D. 1872. W'm H. Bradley, clerk.

On the same day, to wit, the 25th day of September, A. D. 1872, said parties, by their attorneys, filed in said clerk's office their stipu-
3 lation in said entitled cause, which said stipulation is in the words and figures following, to wit:

Stipulation.

In the circuit court of the United States for the northern district of Illinois. July term, A. D. 1872.

JOHN RUCH
vs.
THE CITY OF ROCK ISLAND. } In ejectment.

It is hereby stipulated and agreed by and between the said parties as

follows: That on or about the first day of December, A. D. 1863, the above-named plaintiff, John Ruch, instituted in the above-named court his action of ejectment against the City of Rock Island, as defendant, by serving on the defendant a declaration and notice in ejectment, and filing a copy thereof with proof of said service; that a rule was entered in said court requiring the said defendant to plead to said declaration, and that under such rule his plea of not guilty was filed by said defendant; that afterwards and at the term of said court, A. D. , said cause was tried before said court (Drummond, judge, presiding) and a jury, which trial resulted in a verdict and judgment for said defendant; that afterwards and at the same term, on motion of plaintiff and his showing to the court that he had paid all costs in said cause, a new trial was granted under the statute of Illinois in such cases made and provided, and the said verdict and judgment were vacated and the said cause reinstated on the docket of said court for a new trial; that no other or further proceedings were ever had in said cause, and that on the 9th day of October, A. D. 1871, all the records and files of said court in said cause were burned and destroyed by fire.

It is further stipulated and agreed that the declaration herewith presented and marked "A" is a substantial copy of the one which was filed in said cause and destroyed as aforesaid, and that the accompanying plea marked "B" is a substantial copy of the plea so filed in said cause and destroyed as aforesaid, and that the said declaration and plea may be filed in said court in lieu of the originals which were destroyed, and that the said cause may be reinstated on the docket of said court.

And it is further stipulated that the undersigned, Brackett and Waite, were the attorneys of record in said cause for the plaintiff, and the undersigned, Ira O. Wilkinson, was the attorney of record therein for the defendant.

Dated Chicago, this 9th day of September, A. D. 1872.

BRACKETT AND WAITE,
Attorneys for Plaintiff.

IRA O. WILKINSON,
WILKINSON, SACKETT AND BEAN,
Att'ys for Deft.

(Endorsed:) Filed Sept. 25, 1872. W'm H. Bradley, cl'k.

A.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the circuit court of the United States for the northern district of Illinois, of term, in the year of our Lord one thousand eight hundred and sixty-eight.

John Ruch, who is a citizen of the State of Iowa, plaintiff, by Brackett and Waite, his attorneys, comes and complains of the City of Rock Island, a corporation formed under and by virtue of the laws of the State of Illinois, whose principal place of business is in the city and county of Rock Island and said State of Illinois, defendant, summoned according to the form of the statute in said case made and provided, in a plea of ejectment.

For that, whereas, the said plaintiff on the first day of November, in the year of our Lord one thousand eight hundred and sixty-eight, was possessed of a certain tract, piece, or parcel of land with the appurte-

nances situate in the said city and county of Rock Island and State of Illinois, and known, designated, and described as follows, viz: The undivided three-eighth parts of the block or square known as "Union Block," or "Union Square," bounded on the north by Illinois street, on the south by Orleans street, on the east by Madison street, and on the west by Jefferson street, in what is known as Spencer and Case addition to Rock Island; which said premises the said plaintiff claims in fee, and the said plaintiff being so possessed thereof, the said defendant, afterward, to wit, on the said first day of November, in the year of our Lord one thousand eight hundred and sixty-eight, entered into the said premises and ejected the said plaintiff therefrom, and unjustly
7 withholds from the said plaintiff the possession thereof, to the damage of said plaintiff of one thousand dollars; and therefore he brings suit, etc.

BRACKETT AND WAITE,
Attorneys for Plaintiff.

(Endorsed:) Filed this 25th day of Sept., 1872. W'm H. Bradley, clerk.

B.

In the circuit court of the United States for the northern district of Illinois. Of term, A. D. 1868.

JOHN RUCH
vs.
THE CITY OF ROCK ISLAND. } In ejectment.

And the said defendant, by Ira O. Wilkinson, its attorney, comes and defends the wrong and injury when, &c., and says that it, the said defendant, is not guilty of unlawfully withholding the said premises claimed by the said plaintiff in manner and form as alleged in said declaration, and of this the said defendant puts itself upon the country, &c.

IRA O. WILKINSON,
Att'y for Defendant.

8 (Endorsed:) Filed Sept. 25, 1872. W'm H. Bradley, cl'k.

And on the same day, to wit, the 25th day of September, A. D. 1872, in the record of the proceedings of said court in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

JOHN RUCH
vs.
THE CITY OF ROCK ISLAND. } Ejectment.

By agreement of the parties by their attorneys, as per stipulation filed, leave is given them to file, in place of the original declaration and plea heretofore filed herein and destroyed by fire on the ninth of October last, copies of the same, and it is ordered that said copies be substituted for and stand in the place of the originals.

Afterwards, to wit, on the 5th day of November, A. D. 1875, in the adjourned October term of said court, in the record of the proceedings

thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

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THE CITY OF ROCK ISLAND. } Ejectment.

Now come the parties by their attorneys, and upon issue joined thereupon come a jury of good and lawful men, to wit: Thomas Winston, George N. Jones, Moses S. Earl, James A. Ferguson, William L. Church, j'r, W. F. More, James Parrish, George W. Oyler, Charles Newcomer, Elisha Gridley, William Farnham, and D. E. Adams, who were all duly elected, tried and sworn well and truly to try said issue, and after hearing a part of the evidence, the hour of adjournment having arrived, the further trial of the cause is postponed until to-morrow morning.

Afterwards, to wit, on the 6th day of November, A. D. 1875, said parties by their attorneys filed in said clerk's office their stipulation in said entitled cause in the words and figures following, to wit:

Stipulation.

In the circuit court of the United States for the northern district of Illinois.

JOHN RUCH
vs.
THE CITY OF ROCK ISLAND. } Ejectment.

10 It is hereby stipulated and agreed that on the trial of the above entitled cause, the following are admitted by the parties as facts, for the purposes of the trial of said cause.

1. That the northeast fractional quarter of section 35, township 18 N., R. 2 west of 4th P. M., was duly entered of the United States, by Jonah H. Case, on or about May 21, 1836, and that a patent subsequently issued to him therefor.

2. That afterwards said Jonah H. Case and wife by deed duly conveyed the undivided one half part of said lands to John W. Spencer, prior to the laying off of an addition to Stephenson upon said lands.

3. That the second addition to the "town of Stephenson," so called on the plat thereof, filed for record in the recorder's office of Rock Island County, Illinois, on the 17th day of May, 1836, is also known as "Spencer & Case's addition."

4. That the premises in controversy are a part of the lands first above described, and are of the value of ten thousand dollars and upwards.

C. B. WAITE,
W. S. BRACKETT,
Att'ys for Pl'ff.
IRA O. WILKINSON,
W'M H. GEST,
Atty's for Def't.

11 (Endorsed:) Filed Nov. 6, 1875. W'm H. Bradley, cl'k.

On the same day, to wit, the 6th day of November, A. D. 1875, in the said adjourned October term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

JOHN RUCH
vs.
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Now come again the parties, by their attorneys, and now come also the jury in this behalf empaneled and sworn, and after hearing the concluding evidence and a part of the arguments of counsel, the hour of adjournment having arrived, the further trial of the cause is postponed until Monday morning next.

Afterwards, to wit, on the 8th day of November, A. D. 1875, in the said adjourned October term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett district judge, is the following entry, to wit:

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THE CITY OF ROCK ISLAND. } Ejectment.

Now come again the parties, by their attorneys, and now come also the jury in this behalf empaneled and sworn, and after hearing the concluding arguments of counsel and receiving the instructions of the court, the jury retired to consider of their verdict, and by agreement of the parties, by their attorneys, the jury, when they shall have agreed upon a verdict, may sign and seal the same and deliver it to the clerk and disperse.

Afterwards, to wit, on the 9th day of November, A. D. 1875, in the said adjourned October term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

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THE CITY OF ROCK ISLAND. } Ejectment.

The jury in this behalf empaneled and sworn, this day returned into court their sealed verdict, wherein they say, "We the jury find the defendant not guilty."

13 It is thereupon considered and adjudged by the court that the defendant be discharged, and that it have and recover of the plaintiff its costs and charges about its defence in this behalf expended, amounting to the sum of one hundred and fifty-two dollars and ninety cents, and that it have execution therefor.

And on the same day, to wit, the 9th day of November, 1875, on the hearing of said cause the following exceptions were taken and allowed by the court and made of record in said entitled cause, to wit:

Bill of exceptions.

14 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the circuit court of the United States, northern district of Illinois, October term, A. D. 1875.

JOHN RUCH
v.
THE CITY OF ROCK ISLAND. } Ejectment.

Be it remembered, that on the fifth day of November, A. D. 1875, this

cause came on to be heard, before the honorable Henry W. Blodgett, sitting as presiding judge of said court, and a jury.

It was stipulated and agreed in writing by the counsel on both sides—

1. That the northeast fractional quarter of section 35, township 18 N., R. 2 west of the 4th P. M., was duly entered by Jonah H. Case, on or prior to May 21, 1836, and that a patent subsequently issued to him therefor.

15 2. That afterward said Jonah H. Case and wife duly conveyed the undivided one-half part of said land to John W. Spencer, prior to the laying off of an addition to Stephenson on said land.

3. That the "second addition to the town of Stennson," so called on the plat thereof filed for record in the recorder's office of Rock Island County, Illinois, on the 17th of May, 1836, is also known as "Spencer and Case's addition to Rock Island."

4. That the premises in controversy are a part of the land first above described, and are of the value of ten thousand dollars and upward.

Said stipulation having been read to the court, plaintiff, further to maintain the issue on his part, introduced, by his counsel, without objection, and exhibited in evidence the recorded plat of Spencer and Case's addition to Rock Island, showing the premises in controversy, the same being an unnumbered block or square of ground without mark or designation on said plat, lying between the block numbered seven and the block numbered nine of said plat, as follows:

16 *The second addition to the town of Stephenson.*

I do hereby certify the above is a correct diagram of a survey which I executed for John W. Spencer and Jonah H. Case, of an additional to the town of Stephenson, situated in the northeast fractional
17 quarter of section 35, township 18 north of the base line, range 2 west of the 4th principal meridian, and beginning at the northwest corner of lot one, block 2, at a stone. The lots are laid out 60 feet front & running back 150 feet, each street 80 feet wide, except Water or Front street, which at the northwest corner lot No. 1, block No. 1, 124 feet wide; and at the northeast corner of block No. 4, 63 feet; and the northeast corner of block 5 is 53 feet wide; each and every alley 20 feet wide.

MILES W. CONWAY,
County Surveyor of Rock Island County.

STATE OF ILLINOIS,
Rock Island County, sct.:

At a special term of the county commissioners' court of the said county of Rock Island, on the 17th day of May, 1836, was handed in court the map or plat of the second addition to the town of Stephenson, properly certified and subscribed by Miles W. Conway, county surveyor of the said county of Rock Island, and we, the county commissioners, after receiving the map or plat, are of the opinion that the map or plat is legally and correctly done; we do therefore certify the same. It is therefore ordered that the map or plat be recorded in the recorder's
18 office of Rock Island County, and that this order be endorsed on the plat or map.

A copy. Attest:

JOSEPH CONWAY, *Clerk.*

STATE OF ILLINOIS,
Rock Island County, sct.:

This day personally appeared before me, Joseph Conway, clerk of the circuit court in & for said county, Miles W. Conway and the county commissioners of Rock Island County, and acknowledged the foregoing map or plat to be correct and just, this 17th day of May, 1836.

JOSEPH CONWAY.

STATE OF ILLINOIS,
Rock Island County:

This day personally appeared before me, Miles W. Conway, justice of the peace in and for said county of Rock Island, John W. Spencer and Jonah H. Case, of Rock Island County, and acknowledged the foregoing second additional plat or map of the town of Stephenson to be correct & just, this 17th day of May, 1836.

MILES W. CONWAY, *J. P.*

STATE OF ILLINOIS,
Rock Island County, ss:

19 I, George D. Gould, clerk of the circuit court and ex officio recorder of deeds in and for said county, do hereby certify that the foregoing is a true and correct diagram of the record of the plat of the second addition to the town of Stephenson, and of the certificates attached thereto, filed for record in my office on the 17th day of May, 1836, and duly entered of record therein in book A of deeds, on pages 23 & 24 thereof, as fully, completely, and at large as the same now appears of record therein.

Witness my hand and the seal of said court this seventh day of April, A. D. 1875.

[SEAL.] GEO. D. GOULD, *Cl.*

And thereupon, further to maintain the issue on his part, plaintiff, by his counsel, introduced and read in evidence, without objection, a deed from said Spencer and Case and wives, dated December 8th, 1837, duly executed, acknowledged, and recorded, and conveying to one Benjamin McKay an undivided one-fourth part of said block in controversy.

20 Also, in like manner, plaintiff introduced and read in evidence depositions tending to prove that said Jonah D. Case died intestate in the year 1863, and that his sole heirs at law surviving him were Henry G. Case, Sarah J. Aikin, wife of Cyrus H. Aikin, and Eliza H. Richmond, wife of Roswell Richmond.

Also, in like manner, plaintiff introduced and read in evidence a deed from all of said heirs at law of Jonah H. Case, dated October 31, 1868, duly executed, acknowledged, and recorded, the wives and husbands of the respective parties joining therein, conveying to the plaintiff in this suit all the title and interest of said heirs at law in and to the block of ground in controversy. And thereupon plaintiff rested his case.

Thereupon defendant, to maintain the issue on its part, introduced and read in evidence to the jury the depositions of various witnesses tending to prove that said block of ground in controversy had been dedicated to the public as a public square by said John W. Spencer and Jonah H. Case.

Among others, the deposition of one Henry C. Connelly was in-

21 troduced and read in evidence, for the purpose of proving the contents of a deposition of one Henry Powars, whose deposition had been used on a former trial of this cause, said witness, Powars, having died since the former trial. Said Powars had deposed, as was claimed, that said Spencer and Case, soon after the laying out of said addition, had sold lots fronting on said block of ground as fronting on a public square.

Said Connelly, in said deposition, stated that he was an attorney at law; that he was attorney for defendant in 1869, 1870, and 1871, and was such attorney at the former trial of this cause; that he propounded the interrogatories to said Henry Powars at the time of taking his, Powars', deposition. Witness Connelly then proceeded to give the substance of the testimony of said Powars as given in his (Powars') deposition, he, Connelly, refreshing his recollection by reference to notes taken, as witness said, by him at that time. Witness Connelly held said notes in his hand at the time of giving his testimony, and said he stated what appeared from said notes, and in much of his testimony used the present tense, thus: "Witness says," &c. Witness Connelly said he gave the "main

22 and principal points" of the deposition of said deceased witness, Powars, but could not give the exact language. Witness also said he gave the main and principal points of the cross-examination and re-examination of said Powars as given when Powars' deposition was taken, it having been proven before the deposition of Connelly was offered that said deposition of Powars had been burned with the other records of this court in the great fire of October 9, 1871, in the city of Chicago.

To the introduction of all which portions of Connelly's deposition plaintiff by his counsel objected; but the court overruled the objection and permitted the evidence to go to the jury; to all which plaintiff by his counsel then and there excepted.

In the deposition of one Levi F. Harson, being one of the depositions introduced by defendant, said Harson testified that he was deputy circuit clerk of Rock Island County; that he knew said deceased witness, Henry Powars; that he was the commissioner who took the deposition of said Powars. Witness said he remembered the substance of the testimony of said deceased witness Powars; was not able to give
23 the exact language that he used. Witness Harson then proceeded to make a statement of the substance of Powars' testimony as given at the time when the said deposition of Powars was taken.

To the introduction of said deposition of said Harson, relating to the testimony of said deceased witness, the plaintiff, by his counsel, objected, on the ground that witness does not pretend to give anything more than the substance of the testimony of said deceased witness, and does not undertake to give the exact words of said deposition.

But the court overruled such objections and permitted said evidence to go the jury, to which ruling of the court the plaintiff, by his counsel, then and there excepted.

Said Harson also testified in said deposition that he was acquainted with one Hibbard Moore, now deceased; that the deposition of said Moore was taken and used on the former trial of this cause; that witness Harson was the commissioner who took the deposition of said deceased witness.

The witness thinks it was in the summer of 1869. Witness Harson says he remembers the substance of the deposition of said de-
24 ceased witness; could not give the exact language. Witness then proceeds to state the substance of the deposition of said deceased witness, Moore, as he heard and took down the same as commissioner when same was taken before him.

To the introduction of all of said deposition of Hanson relating to the deposition of the deceased witness Moore, the plaintiff, by his counsel, objected, on the ground that said deposition purports to give only the substance of the deposition of deceased witness Moore, and that only as the same was given before the commissioner, and not the exact language of the deceased witness.

But the court overruled such objection, and permitted said evidence to go to the jury; to which ruling of the court plaintiff, by his counsel, then and there excepted. It also appearing from the proof that said deposition was used on the former trial of this cause, and had been burned with the records of this court in October, 1871;

Thereupon defendant introduced a witness who testified that the addition containing block of ground in controversy abuts on to the east side of the original town plat; that this is sometimes called the sec-
25 ond addition; that the first addition was laid off on the west side of the original town plat, and was sometimes called the "Chicago Addition," but more generally the "Lower Addition." The recollection of witness is that the town of Rock Island, then called Stephenson, was incorporated and organized previous to the year 1841, under the general incorporation law of the State, and was afterwards incorporated under the special law of 1841. That the block in controversy was, in 1838, of but little value. Also, that said block of ground is worth from $75,000 to $100,000, and was worth that sum when this suit was brought.

Defendant also read in evidence, without objection, "An act to incorporate the town of Rock Island, in Rock Island County," approved Feb'y 27, 1841, as found in the laws of the State of Illinois, of the session of 1841, on page 348, and subsequent pages.

As bearing upon said question of dedication, defendant introduced

and read in evidence depositions tending to prove that Spencer and Case, the proprietors, had at various times referred to the block in question as a public square; that the same had been known as a "public square," and had never been assessed for taxes.

26 Defendant having rested, plaintiff, further to maintain the issue on his part, introduced, and by his counsel read in evidence, without objection, the following documents, for the purpose of showing a special dedication of said block for churches and schools:

1. A deed from John W. Spencer and wife and Jonah H. Case and wife to the trustees of the Methodist Episcopal Church of Rock Island, dated April 21, 1843, duly executed and acknowledged and recorded, whereby grantors, in consideration of one dollar, and of "a great regard for the cause of religion and the spread of piety," convey to said church part of said bl'k of ground "in trust for said church or society and for no other use." The portion conveyed by this deed was in the N. W. corner of the block.

2. A deed from said Spencer and Case and wives and Benjamin McKay, to "the First Baptist Church or society, in the town of Rock Island," dated April 28, 1843, duly executed, acknowledged, and recorded, whereby grantors, in consideration as above, convey to said church another portion of said block, in the northeast corner thereof, in trust for said church, &c., "so long as said church or society or trustees shall hold said premises."

3. A deed from said Spencer and Case to trustees of schools of fractional township No. 18 north, range 2 west, in Rock Island County, Illinois, dated July 19, 1849, duly executed, acknowledged, and

27 recorded, whereby grantors, in consideration of one dollar, and of their "regard for the cause of education," convey a portion of said block, in the center thereof, to said trustees, for the use of schools.

4. A deed from Jonah H. Case to "all persons concerned in the open and unnumbered square in the upper or Spencer and Case's addition, in the town of Rock Island," dated July 28, 1849, duly executed, acknown edged, and recorded, whereby, "in consideration of the public good and of a row of trees to be set on each side of the premises;" therein conveyed, grantors convey unto all persons, &c., as above, a strip of land 50 feet wide through the center of said block, "said tract of ground to remain open and unenclosed for the use of all persons concerned in said square forever."

5th. A duly certified copy of the record of certain proceedings in the common council of the city of Rock Island on the 16th of April, 1855, the 31st of March, 1856, and the 4th of October, 1856, relating to certain negotiations with the trustees of said Methodist Episcopal Church and with said trustees of schools, concerning portions of said block in controversy. From this record it appears that on the 16th of April, 1855, the said city contracted to pay to said Methodist Episcopal Church $2,500 in installments, for a quitclaim of all the right, title, and interest of said church in and to said square; that provision was then made for the payment of the money. That on the 31st of March, 1856, a commit-

28 tee was appointed to confer with said school trustees in relation to purchasing their interest in said square; that on the 4th of October, 1856, it was voted by the common council of said city to issue bonds for $1,500 to pay the said trustees for their interest in said block of ground.

6. A deed from the trustees of said Methodist Episcopal Church to the city of Rock Island, dated April 11, 1855, duly executed, acknowl-

edged, and recorded, whereby grantors convey to said city all their interest in said block for the sum of $2,500.00.

7th. A deed from John W. Spencer and wife, dated April, 1855, duly acknowledged, &c., quitclaiming all of Spencer's interest in s'd block to the city of Rock Island.

Plaintiff also introduced evidence in rebuttal, tending to show that said Jonah H. Case, at the time of laying out said addition, or soon after, intended said block for the use of churches and schools; that he intended the central portion for schools, and the four corners for each of four churches, three of the corners for the three churches then in Rock Island, and the other for some other church not then decided upon.

Plaintiff also introduced evidence tending to show that the city of Rock Island first took possession of said block in or about the year 1855. Plaintiff having closed his case, and the cause having been argued to the court and the jury by the respective counsel on each side, plaintiff, by his counsel, requested the court to instruct the jury in his
29 behalf upon the law of the case, as follows:

First. "That if they [the jury] believe from the evidence, under the instructions of the court, that the premises in controversy were never in fact dedicated to the public by Jonah H. Case previous to the year 1855, and if they believe that was the time when the city of Rock Island first took possession of the block of ground in controversy, and the time when the city first claimed that there had been a general dedication of the block for public use, then the mere acquiescence of Case in the adverse possession of the city from 1855 to the time of his death, in 1863, would not of itself be sufficient to bar the plaintiff from recovery. Such adverse possession to bar the plaintiff would have to be at least 20 years."

Second. "The jury cannot presume anything against the right of the plaintiff to recover in this suit because the heirs of Jonah H. Case convey to him by quitclaim deed, or because the consideration in said deed is only one dollar, or because the deed was made only a short time before this suit was brought."

Third. "On the question of dedication the jury should consider the acts and sayings of Case, not only at the time of the sale of lots in 1836, and in 1841 and 1842, but his subsequent acts and sayings also, down to the time when possession was taken by the city."

30 Fourth. "The intention to dedicate land to the public use is not to be inferred from doubtful acts and expressions, but must be clearly and unequivocally proven."

Fifth. "A special dedication, or a dedication for a special purpose, is a very different thing from a general dedication for public use, and if the jury shall believe from the evidence that down to the year 1855 there had been only a special dedication of this land for schools and churches, then the city had no right to take possession of it at that time for any other purpose, nor to hold it subsequently for general public use."

Sixth. "On the question as to whether there had been a general dedication previous to 1855, the acts of the common council of the city of Rock Island in purchasing of the Methodist Church and of Spencer, and of attempting to purchase of the school trustees, may be considered by the jury, who are to determine how far such acts are consistent with a general dedication."

Seventh. "If the jury believe from the evidence that the dedication, if any in this case, of the premises in controversy, made by the original proprietors, was a special dedication for use of churches and schools, and that afterwards the city of Rock Island, the defendant, under-

took to purchase the interests of such churches and schools in said premises, or the interests of any of them, for the purpose of diverting the property to any other than church or school purposes, that in such event the defendant obtained no title through or by reason of any such attempted purchase."

Eighth. "If the jury believe from the evidence that there was a special dedication of the premises in controversy for churches and schools by the original proprietors, and that after such dedication the said churches and schools, or any of them, either abandoned or undertook to sell out their respective interests in said premises or convey the same by deeds to the defendant, to be diverted to any other use than for churches and schools, that in such event no title passed by such sales or deeds to the defendant, but the property reverted to said original proprietors, their heirs or assigns."

Which said instructions the court refused to give, except so far as the same are embodied in his charge; and thereupon the court charged the jury as follows:

GENTLEMEN OF THE JURY: This is an action of ejectment, by which the plaintiff seeks *or* recover in fee the parcel of land usually known and described as "Union Square" or "Church Square," being a block or square in the second addition to the town Stephenson, now the city of Rock Island, in the county of Rock Island, in this district, bounded on the north by Illinois street, on the east by Madison street, on the south by Orleans street, and on the west by Jefferson street, in said addition.

It is admitted that Jonah H. Case, late of Rock Island County, on or about the twenty-first day of June, 1836, purchased from the United States the northeast fractional quarter of section 35, of town. 18 north, of range 2 west of fourth principal meridian; that soon after purchasing said lands from the government, Case conveyed to John W. Spencer an undivided half thereof, and that Spencer and Case caused said tract of land to be surveyed and platted, and the plat thereof to be duly certified and acknowledged and recorded as the second addition to the town of Stephenson, now city of Rock Island; that on the 8th day of December, 1837, Spencer and Case and their respective wives conveyed to Benjamin McKay an undivided quarter of certain lands in said addition, including the square in controversy; that Case died intestate in 1863, leaving as his heirs at law his son, Henry S. Case, and his two daughters, Sarah J. Aiken and Eliza H. Richmond, and on the 31st of October, 1868, prior to the commencement of their suit, said Henry S. Case and the said two daughters, with their respective husbands, joined in a deed by which they conveyed all their right, title, and interest in the land in controversy to the plaintiff, John Ruch.

These facts and conveyances would clothe the plaintiff Ruch with the legal title to three-eighths of the said square of land, and entitle him to recover the same in this action, unless you are satisfied from the evidence in this case that said Jonah H. Case dedicated this parcel of land to the public as a public square during his lifetime. For if he did so dedicate said land in his lifetime, then no estate in said land passed to his heirs on his death, and their deed to the plaintiff conveyed no title. The main question in this suit is, did the said Case and Spencer dedicate said square to the public as a public square during Case's lifetime? Whether said dedication was made or not is a question of fact to be determined by you from the evidence in this case.

Dedications are of two kinds, express and implied. An express dedication is usually made either by a deed or by such express and unequivo-

cal and affirmative acts as show the intention of the party to
34 make the dedication; while an implied dedication may take place with no express act on the part of the owner of the land, but from the fact that the public take possession of a man's land and use it for such a term of years without any objections interposed by or from him as to raise the presumption in law that he intended to allow the public to use it; in other words, to allow the land to become dedicated to the public. In these ways the public acquire the right to most of their highways and streets, either, as I said before, by an express dedication or by an implied dedication. An express dedication of a public road is obtained generally either by the deed of the owner conveying to the public, or by some covenant or expression used in some deed by him, which indicates upon paper and by the deed itself an intention to dedicate, or by platting or recording under the statute of the State.

There is another principle involved in this matter of dedication, to which I will here call your attention, lest it escape me further on; and that is, that a dedication to the use of the public implies almost of itself a right of reversion to the owner whenever the public cease to use the property for the purposes for which it was dedicated. For in-
35 stance, if a strip of land is dedicated to the public for a street or a highway, so long as the public use it for that purpose, the owner cannot interfere with the public use; but when they apply it to other uses, as, for instance, to build upon it, or undertake to grant it out to private parties and private uses, then the right of the public ceases and the property reverts to the owner.

Much has been said, or something has been said in the course of the trial of this case, in regard to a special and general dedication. There is but little distinction in the law between them. In one a dedication may be more broad and comprehensive than in the other, but that is about all the distinction there is. For instance, one man may dedicate a piece of land for the purpose of a church or a school-house, or a court-house. Then the public have no right to use it for any other use than the specific purpose under which he makes the dedication or grant. But if a man sees fit to donate a piece of land to the public as a public square generally, or for general public uses, then the public have a right to use it in a more extended and a more general way than in a special dedication to which I have referred; and that is the only essential distinction between a special and a general dedication.

36 The public are at liberty to take from a private owner, if he sees fit to donate to the public for the purpose, land for any of the general uses which the public as such have any occasion to use lands, such as for parks, public grounds, court houses, churches, public buildings of any character, and for highway or streets; and for these general reasons they may hold and use and own the land. Whenever the public ceases to use the property for the purposes for which it was dedicated, then the right of the public ceases and the title reverts.

The statute of this State in force at the time this addition was platted and recorded provided that the act of platting, acknowledging, and recording a map or subdivision of land into town lots or blocks should be equivalent in law to a conveyance to the public authorities for public use of all such lots or parts of the said plat as were marked or noted on said plat as donated to the public for the specific purposes therein indicated. Where a dedication is made in this statutory way, there is usually no doubt of the owner's intention to so dedicate or donate the land to the use of the public.

But a dedication or donation of land to public uses may be made in

other ways than by platting and recording the same as provided
37 by statute. The platting and recording is only one method by which the owner of land may indicate his intention to donate or dedicate it to the public. He may do it in other ways, as by suffering the public to take possession of the land under such circumstances as to indicate his intention to donate; and the acceptance of the donation by the public, and the continuation of such possession for a long time by the public, and the acquiescence by the owner, is to be deemed as amounting to a dedication.

Hence, under certain circumstances, it is not necessary, in case of an express dedication, that any special time should transpire.

In the case of an implied dedication, where there is no affirmative act on the part of the owner, the law usually, and in the State unequivocally, requires that the possession should continue by the public for at least twenty years, and it takes that time for the presumption to arise or to be created that a grant has been made, or a matured intention to dedicate has been arrived at by the owner. But where an express dedication has been made it is not necessary that so much time should transpire. For illustration, if a man lays out through his land what
38 was obviously intended as a highway, and fences it on each side, or otherwise indicates that it is intended as a highway, and the public accept it as such, and enter upon its possession and work it, and if he from time to time makes conveyance bounded by such highway, showing an intention to treat it on his part as a highway, then it is not necessary that the grant should run twenty years in order to raise the presumption of a dedication; but if the public, without the consent of the owner, enter into the possession of his land, and he simply acquiesces in it, and there is no overt or affirmative act on his part, then the possession must continue for the period of twenty years.

Here it is not claimed that there is any such noting or marking on the plat as amounts to a donation or dedication of the square in controversy under the statute. But while this plat is not of itself under the law to be considered as a grant or conveyance to the public, there are certain indicia upon its face which you have a right to consider as circumstances tending to show an intention to dedicate. For instance, the square is not numbered as the other squares in this plat are numbered. It lies unnumbered between seven (7) and nine (9). The lots in the
39 blocks facing the square are made to front upon it, and in a different manner from what the lots in the other blocks front. As you will see by examining the plat and in the squares surrounding this block, the alleys separate those squares differently from what they do the squares which do not front upon this block, showing an apparent intention that the lots should front upon this square.

It may, I think, be pertinently asked: If these owners intended to retain this square as private property, why did they not number it in consecutive order with the other blocks contained in the said square? And so, too, it may be asked, why did they make this change in the frontage of the other lots? These are circumstances, however, solely for your consideration, and upon which the court does not presume to pass. So, too, the fact that this block has never been returned by either lease, Spencer or McKay, for assessment and taxation, and has never been so assessed or taxed, is a circumstance of much significance as tending to show, not that they no longer considered themselves as owners but that the public authorities deemed the square to be public property, and as such not liable to taxation. The mere fact that the owner of land fails or neglects to return it for taxation could not very well

40 be deemed of itself an abandonment of the claim of ownership, because many owners of property fail to list it for taxation, leaving the assessors to make up the lists; but when we find a given parcel of land situated as this was, running through a long series of years without being burdened by taxation, the circumstances may be deemed quite significant and worthy of consideration as tending to show that it was not deemed a proper subject of taxation, and that it escaped this common burden by reason of its being understood at least to be public property. The defendant has also offered proof of divers statements made by M'r Case in his lifetime of an intention to dedicate this square for public use as a public square, with no reservation for any special use to which it was to be applied by the public. It appears that prior to the great fire of 1871, the deposition of M'r Powers, an old resident of Rock Island, had been taken and used on a former trial of this case in this court. This deposition was burned in that fire, with other records of the court. And M'r Powers having died, evidence has been taken to show the contents of this deposition. This class of proof is admissible under the circumstances, because it is the best that can be obtained. You are to receive it with some degree of caution, however, from the fact
41 that the witnesses are repeating only their recollection of what the witness has testified to.

In this instance the witness Connelly swears that he has notes and memoranda of the deposition of M'r Powers taken at the former trial, and by which his recollection is aided and refreshed. This witness, M'r Powers, it would appear from the evidence of his former testimony, acted as an auctioneer at a public sale of lots in this addition made by Case & Spencer soon after the addition was laid out, and at said sale both Spencer & Case represented that said square was a public square, or assented to such representation made by Powers as their agent. And it is claimed that these lots were sold with the express understanding that the lots fronting on this square were fronting on a public square, which was to be a public square for all time to come. And it is claimed to be shown that those lots so fronting on this public square brought a larger price in consequence of these representations in regard to the character of this square.

There is also the testimony of several other witnesses tending to corroborate this testimony of M'r Powers. All this testimony of witnesses as to M'r Case's declarations, on or about the time he was putting the lots in this addition upon the market, are significant as tending to show an actual intention to dedicate and an actual dedication, so
42 far as he could make one by verbal expressions and by his conduct in the premises.

And so also is the testimony tending to show that from about the year 1855 the city of Rock Island took possession of this square and made improvements thereon, treating it as one of the public squares of said city, without objection from M'r Case, although he lived for about ten years afterwards and in the immediate vicinity of the city at the time. This acquiescence on his part in the assertion by the defendant of a right to control this square, like all the other acts shown in the testimony, tends to show only that he considered the city the owner of this property. It is for you to say whether it makes out such a case when all taken together.

It is your province to weigh all the evidence and determine whether, when all taken together, it satisfies you that Case did intend to dedicate his interest in this square to the public use. While any one of these circumstances standing alone may not be sufficient to justify you in

finding this intention, yet you may be satisfied from all, when taken as grouped together, that he did so intend to dedicate; and when such dedication, made by express acts and declarations, was accepted by the public, it becomes binding upon M'r Case.

On the part of the plaintiff, it is contended that the only dedi-
43 cation intended by M'r Case was a special one to the use of the public for schools and churches. And there is testimony in the case tending to show that in his conversation with some persons M'r Case stated that this square was for the use of schools and churches, and, as it is claimed by the plaintiff in corroboration of this theory of a special dedication, certain conveyances made by M'r Case and his co-owner to a Baptist church and a Methodist church and to the school trustees, of portions of this block, are put in evidence, all to be considered and weighed by you. All this it is your duty to consider, with the other testimony, as tending to throw light on the intention of M'r Case in regard to the purposes to which this block was to be applied. It is possible that he may have considered that the temporary occupation of parts of this block for church or school purposes was not inconsistent with the general right of the public to use the property as a public square. He may have thought for the time being the best use to be made of a public square was to put public buildings like churches and school-houses upon it, with the right, however, of the public at large, whenever they saw fit to act through the city authorities, to remove those structures therefrom and occupy the square for other purposes.

This may have been the view with which M'r Case made the deed
44 to these churches and these school trustees, with the idea that in so doing he was not interferring with the general right of the public to use this square, but only consenting to this use for the time being.

It is for you, however, with the light the evidence furnishes you in this case, to say what effect is to be given to these deeds as evidence of intention. There are also certain expressions in the deed made by Case and Spencer to McKay in regard to this block which you should consider as bearing upon the question at issue and as to the use to which this block was intended to be applied.

There is no proof in the case tending to show what Spencer & Case meant and intended in their conveyance to McKay by the words which they used in reference to this square, calling it a "public square." But as I have already explained to you, there still remained in Spencer & Case a reversionary right both to the levee in front of this town and to this public square, in case it should in some future day cease to be used for public purposes of any kind; in that event it would become the property of the original owners or their grantees; and they may have intended simply to possess McKay with the reversionary right in one-fourth of it as they themselves had in the rest of it.

45 I will here say that while Case & Spencer were acting together in the sale and management of this addition, including the block in question, what both said in regard to the uses to which this square was to be applied are admissible in evidence, but after they ceased to act together and be interested together the acts or sayings of Spencer are not admissible as against the plaintiff in this case, or against Case or his heirs. In other words, as, for illustration, what they both said and did at the time of the auction, back in the days of 1836 or 1837, is admissible, because they were then acting together as joint owners. But what M'r Spencer said and did in 1855, at the time the deed was made by the Methodist church to the city, is not admissible against

Case, because there seems to have been no unity of action between them at that time.

The fact that this square was not, from the time this plat was made, assessed for taxes is a circumstance tending to show that it was accepted by the public as a public square. If there was no general understanding that this square was intended for the public, it may well be asked, why did it remain so many years without taxation, even before it was occupied for school or church purposes? In case McKay and Spencer considered it their private property, why did they not
46 return or list it for taxation among their other private property?

The public authorities were not compelled to enter at once upon the possession of the property and commence improvements thereon in order to avail themselves of the dedication. If they did other acts, such as omitting to tax, which showed that the dedication was acquiesced in and accepted by the public authorities, they could, by exempting the land from taxation or any other act which showed that they considered this a public square, have accepted the dedication and taken their own time to take actual manual possession and make improvements. That depended entirely upon the disposition, taste, and means of the party to whom the dedication was made.

The real question is, does the proof in this case satisfy you that the owners of this square, in 1836, expressed and gave out by their talk and actions their intention to dedicate this square to the public, and continued to act in harmony with such expressions for such time as to give the public fully to understand that this was a public square? Attention has been called by counsel to the consideration in the deed from the heirs of Case to the plaintiff in this suit. It is almost unnecessary, it seems to me, for the court to say to you that the amount of consideration expressed in that deed has no bearing in this case upon the
47 legal interest. If the heirs owned a three-eighths interest in this property, they had a right to convey it to the plaintiff in this suit for one dollar or one thousand dollars, as they saw fit.

I will then say in conclusion, gentlemen, that unless a general dedication to the public use is made out by the proof in this case then the plaintiff is entitled to recover. If you are satisfied from the proof in this case that Jonah H. Case did manifest a public intention, in 1836, to dedicate this property to the public, and acted in conformity therewith, and if the public accepted such dedication, and from that time forward have treated this as a public square, then you will be justified in finding that the dedication was complete. If you find that there has been no dedication the form of your verdict will be: We, the jury, find the defendant guilty and find the plaintiff seized in fee of three-eighths of the square in controversy; and if on the contrary you find that the dedication is made out by the proof, the form of your verdict will be: We, the jury, find the defendant not guilty.

48 To which charge of the court no exception was taken except as to the refusal of the court to give the instructions as asked, and to all of said charge inconsistent with the said instructions asked for by plaintiff's counsel.

And forasmuch as the matters and things herein contained do not appear in the record in said cause or not completely therein, this bill of exceptions is prepared, and the court is asked to sign and seal the same,

and make the same a part of the record in this cause, and the same is accordingly done.

Witness my hand and seal.

H. W. BLODGETT. [SEAL.]

(Endorsed:) Filed Nov. 9, 1875. W'm H. Bradley, cl'k.

49 Afterwards, to wit, on the 10th day of November, A. D. 1875, in the said adjourned October term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

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Now comes the plaintiff by his attorney, and moves the court to set aside and vacate the judgment entered herein on yesterday and grant a new trial, and the court being now sufficiently advised upon said motion, overrules the same.

Afterwards, to wit, on the 19th day of October, A. D. 1877, said plaintiff, by his attorneys, filed in said clerk's office his bond in said entitled cause, which said bond is in the words and figures following, to wit:

Bond.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

To the circuit court of the United States in and for the northern district of Illinois:

JOHN RUCH
v.
THE CITY OF ROCK ISLAND. } Ejectment.

50 Know all men by these presents that we, John Ruch, of the city of Davenport, State of Iowa, and William S. Brackett and Catherine V. Waite, of the city of Chicago, State of Illinois, are held and firmly bound unto the city of Rock Island and its corporate successors in the sum of five hundred dollars, to be paid to the said The City of Rock Island and its corporate successors; to which payment well and truly to be made we bind ourselves and each of us jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Signed and sealed with our seals, and dated this thirteenth day of October, A. D. 1877.

Whereas the above-named John Ruch hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled cause by the circuit court of the United States in and for the northern district of Illinois:

Now, therefore, the condition of this obligation is such that if the above-named John Ruch shall prosecute his said writ of error to effect and answer all damages and costs if he shall fail to make good

51 his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

JOHN RUCH. [SEAL.]
WILLIAM S. BRACKETT. [SEAL.]
CATHARINE V. WAITE. [SEAL.]

Signed and sealed by said John Ruch, in presence of—
JOSEPH W. BRACKETT.
H. S. CASE.

Signed and sealed by said William S. Brackett and Catharine V. Waite in presence of—
HENRY MCKAY.
J. R. DOOLITTLE, Jr.

Approved.

H. W. BLODGETT,
Judge.

(Endorsed:) Filed Oct. 19, 1877. W'm H. Bradley, clerk.

52 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for the northern district of Illinois, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in said court in the cause wherein John Ruch is the plaintiff and City of Rock Island is the defendant, as the same appears from the files and records of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at my office in Chicago, in said district, this 25th day of October, A. D. 1877, and of our Independence the one hundred and second year.

[SEAL.] W'M H. BRADLEY, *Clerk.*

53 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

The United States of America to the judges of the circuit court of the United States for the northern district of Illinois, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is before you in said circuit court, between John Ruch, plaintiff, and The City of Rock Island, defendant, in an action of ejectment, a manifest error hath happened, to the great damage of the said John Ruch, as by his complaint appears, and it is being fit that the error, if any there has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. 1878, in the Supreme Court to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this ninth day of October, in the year of

our Lord one thousand eight hundred and seventy-seven, and of the Independence of the United States the 102nd year.

[SEAL] W'M H. BRADLEY, *Clerk.*

(Indorsed:) Supreme Court of the United States. John Ruch vs. The City of Rock Island. Writ of error. Filed Oct. 9, 1877. W'm H. Bradley, cl'k. Brackett & Waite & W. S. Brackett, pl'ff's att'ys.

54 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

To the City of Rock Island, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, A. D. 1878, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, wherein John Ruch is plaintiff and you, The City of Rock Island, are defendant, in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Henry W. Blodgett, dist. judge nor. dist. Ill's, this nineteenth day of October, in the year of our Lord one thousand eight hundred and seventy-seven.

H. W. BLODGETT,
Judge.

(Indorsed:) Supreme Court of the United States. John Ruch vs. The City of Rock Island. Citation to October term, A. D. 1878.

55 UNITED STATES OF AMERICA, *ss:*

In the Supreme Court.

JOHN RUCH, PLAINTIFF IN ERROR,
vs.
THE CITY OF ROCK ISLAND, DEFENDANT IN error.

Error to the circuit court of the United States for northern district of Illinois.

We hereby admit due service of the annexed citation on the said defendant in error by reading and by service of a true copy of said citation on each of us, at the respective dates and times written opposite our signatures, as witness:

Octo. 20, 1877. IRA. O. WILKINSON,
Attorney of Record for said Defendant in the United States Circuit Court Northern District of Illinois.

Oct. 27, 1877. WILLIAM H. GEST,
Attorney of Record for said Defendant in the United States Circuit Court Northern District of Illinois.

Oct. 23, '77. W. P. BUTLER,
Mayor of the City of Rock Island, Illinois.

Oct. 27, 1877. WILLIAM H. GEST,
City Attorney of the City of Rock Island, Illinois.

56 UNITED STATES OF AMERICA, *ss:*

In the Supreme Court.

JOHN RUCH, PLAINTIFF IN ERROR,
vs.
THE CITY OF ROCK ISLAND, DEFENDANT IN error.

Error to the circuit court of the United States in and for the northern district of Illinois.

UNITED STATES OF AMERICA,
Northern District of Illinois, County of Cook, ss:

William S. Brackett, being duly sworn, deposes and says that he is an attorney and counselor at law, residing in the city of Chicago in the said district; and that he, deponent, served the annexed citation by personally delivering a true copy thereof on the twentieth day of October, A. D. 1877, at the said city of Chicago, to Ira O. Wilkinson, esq., an attorney and counselor at law, and one of the attorneys of record for said defendant, The City of Rock Island, in the cause appealed from in the said circuit court. And further saith not.

WILLIAM S. BRACKETT.

Subscribed and sworn to by the said William S. Brackett before me this 20th day of October, A. D. 1877.

[SEAL.] ALONZO J. SAWYER,
Notary Public in & for Cook County & State of Illinois.

STATE OF ILLINOIS,
Cook County, ss:

I, Hermann Lieb, clerk of the county court of Cook County, the same being a court of record, do hereby certify that Alonzo J. Sawyer, esq., whose name is subscribed to the annexed jurat, was, at the time of signing the same, a notary public in and for Cook County, duly commissioned, sworn and acting as such, and authorized to administer oaths; that I am well acquainted with his handwriting, and I verily believe that the signature to the said jurat is genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at the city of Chicago, in the said county, this 20th day of October, 1877.

[SEAL.] HERMANN LIEB, *Clerk.*

57 UNITED STATES OF AMERICA, *ss:*

In the Supreme Court.

JOHN RUCH, PLAINTIFF IN ERROR,
vs.
THE CITY OF ROCK ISLAND, DEFENDANT IN error.

Error to the circuit court of the United States in and for the northern district of Illinois.

UNITED STATES OF AMERICA,
Northern District of Illinois, County of Rock Island ss:

Joseph W. Brackett, being duly sworn, deposes and says that he is

an attorney and counselor-at-law, residing in the said county of Rock Island, in the said district, and that he, deponent, served the annexed citation by personally delivering a true copy thereof on the twenty-seventh day of October, A. D. 1877, at the city of Rock Island, in the said county of Rock Island, in said district, to William H. Gest, esq., an attorney and counselor at law, and one of the attorneys of record for said defendant, The City of Rock Island, in the cause appealed from in said circuit court, and also by personally delivering a true copy of said citation on the twenty-third day of October, A. D. 1877, at the said city of Rock Island, to William P. Butler, esq., mayor of the city of Rock Island, Illinois, and also by personally delivering a true copy of said citation on the twenty-seventh day of October, A. D. 1877, at the said city of
58 Rock Island, to William H. Gest, esq., an attorney and counselor at law and city attorney of the city of Rock Island, Illinois.

And further deponent saith not.

JOSEPH W. BRACKETT.

Subscribed and sworn to before me by the said Joseph W. Brackett, on this 29th day of October, A. D. 1877.

[SEAL.] CHA'S W. O'NEIL,
Notary Public in & for Rock Island Co., Ill's.

(Indorsed:) Supreme Court of the United States. John Ruch v. The City of Rock Island. Citation to October term, 1878.

STATE OF ILLINOIS,
Rock Island County, ss:

OFFICE CLERK OF COUNTY COURT,
Rock Island, Illinois.

I, John V. Cook, clerk of the county court in and for said county, do hereby certify that Cha's W. O'Neil, whose name appears subscribed to the foregoing affidavit, and by whom said affidavit was taken, is now, and was at the time of taking the same, an acting notary public in and for said county and State, duly appointed and qualified, and that full faith and credit are due to his official acts. I further certify that I am acquainted with the handwriting of said notary and verily believe his signature to the same is genuine.

In testimony whereof I have hereunto set my hand and affixed the official seal of Rock Island County, at my office in Rock Island, this 29th day of October, A. D. 1877.

[SEAL.] JOHN V. COOK, *Clerk.*

(Indorsement on cover:) No. 640. John Ruch, plaintiff in error, *plaintiff in error*, v. The City of Rock Island. N. Illinois C. C. U. S. Filed 21 January, 1878.

Questions under the Laws of Dedication

[No. 1042.]

Supreme Court

OF THE

United States.

October Term, A. D. 1878.

JOHN RUCH,
v.
THE CITY OF ROCK ISLAND.

Ejectment.
Error from N. District of Illinois.

Plaintiff's Brief.

CHICAGO:
A. B. Case & Son, Book, Job and Music Printers,
203 and 205 Clark Street.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1878.

By Writ of Error to the Circuit Court of the United States, for the Northern District of Illinois. } *Writ sued out by Plaintiff in*

JOHN RUCH,
vs.
THE CITY OF ROCK ISLAND. } *Ejectment.*

Abstract of Record.

This was an Action of Ejectment, commenced by the plaintiff, before the Great Chicago Fire of 1871, in which the Records of the Court below were destroyed.

On the 25th day of September, 1872, there was filed, in the Court below, the following

STIPULATION.

"It is hereby stipulated and agreed, by and between the said parties, as follows:

"That on or about the first day of December, 1868, the above named plaintiff, John Ruch, instituted, in the above named Court, his action of Ejectment against the City of Rock Island as defendant, by serving on the defendant a declaration and notice in Ejectment, and

filing a copy thereof, with proof of said service; that a rule was entered in said Court, requiring the said defendant to plead to said declaration; and that under such rule, his plea of not guilty, was filed by defendant; that afterward (in substance) there was a jury trial, which resulted in a verdict and judgment for defendant; that afterward at the same term, plaintiff having paid all costs, was awarded a new trial, under the Statute of Illinois; that the judgment was vacated, and the cause re-instated on the docket, for a new trial; that no other proceedings were had in the cause, previous to the destruction of the records of the Court, in October, 1871.

It was further stipulated that the declaration and plea, then presented to the Court, were substantial copies of the declaration and plea which were filed in said cause and destroyed, and that they might be filed in lieu of the original; and that said cause might be re-instated on the docket. Also that Brackett and Waite were the attorneys of record for plaintiff, and Ira O. Wilkinson for defendant.

The stipulation was signed by the same attorneys, and by Wilkinson, Sackett and Bean for defendant. [*Record, p. 3, 4 and 5.*

Upon filing this stipulation, the Court the same day granted

Leave to File Copies of Pleadings,

and to substitute the same for the originals. [*Record, p. 8.*

On the same day, September 25th, 1872, the plaintiff filed in the Court below his Bond for Costs, in the usual form; also his

DECLARATION,

in which he claimed, in fee, the undivided three-eighths part "of the block or square known as 'Union Block,' or 'Union Square;' bounded on the North by Illinois Street, on the South by Orleans Street, on the East by Madison Street, and on the West by Jefferson Street; in what is known as Spencer and Case's Addition to Rock Island;" in the City and County of Rock Island, and State of Illinois. Alleging possession of plaintiff on the 1st day of November, 1868. [*Record, p. 5, 6 and 7.*

On the same day, defendant filed his Plea of NOT GUILTY. [*Record, p. 7.*

Afterward, on the 5th day of November, 1875, said cause came on for

TRIAL

before the Honorable Henry W. Blodgett, District Judge, and a Jury. [*Record, p. 8 and 9.*

On the trial, the attorneys filed the following

STIPULATION:

1. That the North-East Fractional Quarter of Section 35, Township 18 N. R. 2 West of 4th P. M., was duly entered of the United States, by Jonah H. Case, on or about May 21, 1836, and that a patent subsequently issued to him therefor.

2. That afterward, said Jonah H. Case and wife by deed duly conveyed the undivided one half part of said land to John W. Spencer, prior to the laying off of an Addition to Stephenson, upon said land.

3. That the "Second Addition to the Town of Ste-

phenson," so called on the Plat thereof, filed for record in the Recorder's Office of Rock Island County, Illinois, on the 17th day of May, 1836, is also known as "Spencer and Case's Addition.

4. That the premises in controversy are part of the land first above described, and are of the value of Ten Thousand Dollars and upwards.

Signed by counsel for both parties. [*Record, p 16.*

On the Trial, there was introduced the following

Evidence for Plaintiff.

A. *Recorded Plat of Spencer & Case's Addition to Rock Island,* showing the premises in controversy; the same being an unnumbered block or square of ground, without mark or designation on said Plat, lying between the block numbered seven and the block numbered nine, of said Plat, as follows: See Record, page 15 and page 16, where is a copy of said Plat.

Following the Plat, are the Certificate of the County Surveyor of Rock Island County; the Approval of the County Commissioners of said County; the Acknowledgments of all parties, and the Certificate of the proper Clerk as to the correctness of the Plat and Certificate attached.

This Certificate shows that the Plat was filed May 17th 1836, and duly recorded. [*Record, p 16, 17, 18 and 19.*

B. Deed from said Spencer and Case and wives, dated December 8, 1837, duly executed, acknowledged and recorded, conveying to Benjamin McKay, an undivided one-fourth part of the block in controversy. [*Record, p. 19.*

C. Depositions tending to prove that said Jonah H. Case died, intestate, in the year 1863, and that his sole heirs at law, surviving him, were Henry S. Case, Sarah J. Aikin, wife of Cyrus H. Aikin, and Eliza H. Richmond, wife of Roswell Richmond. [*Record, p. 20.*

D. Deed from all of said heirs at law of Jonah H. Case, dated October 31, 1868, duly executed, acknowledged and recorded, the wives and husbands of the respective parties joining therein, conveying to the plaintiff in this suit, all the title and interest of said heirs at law, in and to the block of ground in controversy. [*Record, p. 20.*

And thereupon plaintiff rested his case.

Defendant's Evidence.

A. Depositions of witnesses, tending to prove that the block of ground in controversy had been dedicated to the public as a public square, by said John W. Spencer and Jonah H. Case.

a. Deposition of Henry C. Connelly.

b. Deposition of Levi F. Harson.

(See 1st Assignment of Errors herein, in which, all that is given in the Record, of the Depositions of Connelly and Harson, is fully set out.)

c. Depositions of other witnesses, tending to prove that Spencer and Case, the proprietors, had at various times, referred to the block in question as a Public Square; that the same had been known as a "Public Square," and had never been assessed for taxes. [*Record, p. 25.*

B. Evidence that the Addition containing this block abuts on to the East side of the Original Town Plat, and is sometimes called the Second Addition; the First Addition having been laid off on the West Side; and tending to prove that the Town of Rock Island, then called Stephenson, was incorporated and organized previous to the year 1841, under the General Incorporation Law of the State. [*Record, p. 24-5.*

C. Defendant also read in evidence without objection, an "Act to incorporate the Town of Rock Island, in Rock Island County," Feb. 27, 1841, as found in the Laws of the State of Illinois, of the Session of 1841, on page 348 and subsequent pages. [*Record, p. 25.*

Defendant having rested, plaintiff's counsel introduced and read in evidence, without objection, the following documents, as

Rebutting Evidence.

1. Deed from John W. Spencer and wife and Jonah H. Case and wife to the Trustees of the Methodist Episcopal Church of Rock Island; dated April 21st, 1843, conveying, in consideration of one dollar, "and of a great regard for the cause of religion and the spread of piety," part of said block, to said Church, "in trust for said Church or Society, and for no other use."

The portion conveyed by this deed, was in the North West corner of the block. [*Record, p. 26.*

2. Deed from said Spencer and Case and wives, and Benjamin McKay, to the First Baptist Church, or Society, in the Town of Rock Island, dated April 28, 1843, conveying to said Church, in consideration as above, another portion of said block, in the North

East corner thereof, in trust for said Church, &c., "so long as said Church, or Society, as Trustees, shall hold said premises." [*Record, p. 26.*

3. Deed from said Spencer and Case to the Trustees of Schools of Frl. Town. 18 N. R. 2 West, in Rock Island County, Illinois, dated July 19, 1849, conveying, in consideration of one dollar, and of their "regard for the cause of education" a portion of said block, in the center thereof, to said Trustees, "for the use of Schools." [*Record, p. 26 and 27.*

4. Deed from said Jonah H. Case, to "all persons concerned in the open and unnumbered square, in the Upper, or Spencer and Case's Addition in the Town of Rock Island, dated July 28, 1849, conveying, "in consideration of the public good, and of a row of trees to be set on each side of the premises" therein conveyed, a strip of land, 50 ft. wide, through the center of said block; said tract "to remain open and unenclosed, for the use of all persons concerned in said square forever."

All of said deeds were duly executed, acknowledged and recorded. [*Record, p. 27.*

5. Certified Copy of record of proceedings in the Common Council of the City of Rock Island, April 16, 1855, March 31, 1856, and October 4, 1856, relating to certain negotiations with the Trustees of said Methodist Episcopal Church, and with said Trustees of Schools, concerning portions of said block.

From this record it appears, that on the 16th of April, 1855, said City contracted to pay to said Methodist Episcopal Church, $2,500, in installments, for a quit-claim of all the right, title and interest of said

Church, in and to said square; that provision was then made for the payment of the money.

That on the 31st of March, 1856, a Committee was appointed to confer with said School Trustees, in relation to purchasing their interest in said square; and that on the 4th day of October, 1856, it was voted by the Common Council of said City, to issue bonds for $1,500 to pay the said Trustees for their interest in said block. [*Record, p. 27–28.*

6. Deed from the Trustees of said Methodist Episcopal Church to the City of Rock Island, duly executed, acknowledged and recorded, dated April 11, 1855, conveying to said City, all their interest in said block for the sum of $2,500. [*Record, p. 28.*

7. Deed from John W. Spencer and wife, duly acknowledged, etc., dated April, 1855, quit-claiming all of Spencer's interest in said block, to the City of Rock Island. [*Record. p. 28.*

Plaintiff also introduced evidence in rebuttal tending to show that said Jonah H. Case, at the time of laying out said Addition, or soon after, intended said block for the use of churches and schools; that he intended the central portion for schools, aud the four corners, one for each of four churches; three of the corners for the three churches then in Rock Island, and the other for some other church, not then decided upon. [*Record, p. 28.*

Possession.

Plainfiff also introduced evidence tending to show, that the City of Rock Island first took possession of said block, in or about the year 1855. [*Record, p 28.*

Instructions.

Plaintiff having closed his case, and the cause having been argued to the Court and the Jury, Plaintiff, by his counsel, requested the Court to instruct the Jury, in his behalf, upon the law of the case, as follows: (For these Instructions, see 2nd Assignment of Error herein, where the same are set forth verbatim. Also that portion of the Charge of the Court below, which was given in lieu of same.)

But the Court refused to give said Instructions, asked for by plaintiff's counsel; to which refusal of the Court to give said Instructions, counsel for plaintiff then and there excepted. [*Record, p. 48.*

Judge's Charge.

The Court then proceeded to charge the Jury, as follows:

(For those portions of the Charge of the Court excepted to, see 3d Assignment of Error herein, wherein the same are set forth verbatim.)

Verdict of the Jury

was *Not Guilty*, and the Court rendered JUDGMENT FOR DEFENDANT. [*Record, p. 12 and 13.*

The Court allowed and signed a

Bill of Exceptions,

the substance of which is embodied in this Abstract.

The Jury having, by consent of counsel, returned a sealed verdict, the next day, November 10, 1875, the plaintiff, by his attorney, entered his

Motion to Set Aside the Judgment, and for New Trial, which was overruled. [*Record, p. 49.*

On the 9th of October, 1877, plaintiff filed his BOND FOR COSTS. [*Record, p. 49, 50 and 51.*

The foregoing is a complete and full Abstract of the Record, to which is attached *Writ of Error,* dated Oct. 9th, 1877, returnable the 2nd Monday of October, 1878, also Citation, and Affidavits, and Acknowledgments of Service.

Assignment of Errors.

I. *The Court below erred, in admitting to go to the Jury, on behalf of the defendant below, improper and incompetent evidence; to-wit:*

a. Portions of the Deposition of Henry C. Connelly. [Record, p. 21 and 22.

The Court below permitted the defendant, against the objection of plaintiff, to read to the Jury, for the purpose of showing the contents of the deposition of one Henry Powars, who had given testimony, as was claimed, against plaintiff, material to the issue, and who had died since the former trial of this cause, certain portions of the deposition of said Henry C. Connelly.

After stating that he was an attorney for defendant, in 1869, 1870 and '71, and was such attorney at the former trial of this cause, and that he propounded the interrogatories to said Henry Powars, witness Connelly, proceeded to give the substance of the testimony of said Powars, as given in Powars' deposition; he the said

witness, Connelly, refreshing his recollection by reference to notes, taken, as witness said, by him at that time.

Witness Connelly held said notes in his hand, at the time of giving his testimony, and said he stated what appeared from said notes; and in much of his testimony, used the present tense; thus: "witness says," &c. Witness Connelly said he gave the "main and principal points" of the deposition of said deceased witness Powars, but could not give the exact language. Witness also said he gave the main and principal points of the cross examination and re-examination of said Powars, as given when Powars' deposition was taken. It having been proven, before the deposition of said Connelly was offered, that said deposition of Powars had been burned with the other records of the Court below, in the Great Chicago Fire of October 9, 1871. [*Record, pages 21–22.*

Said Powars had deposed, as was claimed, that said Spencer and Case, soon after the laying out of said Addition, had sold lots fronting on said block, as fronting on a public square. [*Record, page 21.*

"To the introduction of all which portions of Connelly's deposition, plaintiff, by his counsel objected; but the Court overruled the objection, and permitted the evidence to go to the Jury; to all which plaintiff, by his counsel, then and there excepted." [*Record, p. 22.*

b. Portions of the Deposition of Levi F. Harson. [Record, p. 22, 23 and 24.

Defendant's counsel, for the purpose of showing the contents of said deposition of said deceased witness

Powars, introduced the deposition of said Levi F. Harson; wherein witness, having testified that he was Deputy Circuit Clerk of said Rock Island County, and that he was the Commissioner who took the deposition of said Powars, said he remembered the substance of the testimony of said deceased witness Powars; that he was unable to give the exact language that he, Powars, used.

Witness Harson then proceeded to make a statement of the substance of Powars' deposition.

"To the introduction of said deposition of said Harson, relating to the testimony of said deceased witness, the plaintiff, by his counsel, objected, on the ground that witness does not pretend to give any thing more than the substance of the testimony of said deceased witness, and does not undertake to give the exact words of said deposition. But the Court overruled such objections, and permitted said evidence to go to the jury; to which ruling of the Court, the plaintiff, by his counsel, then and there excepted." [*Record, pp. 22–23.*

Said Harson also testified, in said deposition, that he was the Commissioner who took the deposition of one Hibbard Moore, now deceased.

Witness Harson said he remembered the substance of the deposition of said deceased witness, Moore. Could not give the exact language. Witness then proceeded to state the substance of the deposition of said deceased witness, Moore, as he heard and took down the same as Commissioner.

"To the introduction of all of said deposition of Harson, relating to the deposition of deceased witness

Moore, the plaintiff, by his counsel, objected, on the ground, that said deposition purports to give only the substance of the deposition of deceased witness, Moore, and that only as the same was given before the Commissioner, and not the exact language of the deceased witness. But the Court overruled such objection, and permitted said evidence to go to the Jury; to which ruling of the Court, plaintiff, by his counsel, then and there excepted. It also appearing, from the proof, that said deposition was used on the former trial of this cause, and had been burned, with the records of the Court, in October, 1871. [*Record, pp. 23-24.*

II. *The Court below erred in refusing to give to the Jury the following Instructions, asked for by the Counsel for plaintiff, to wit:*

1. If they (the Jury) believe, from the evidence under the Instructions of the Court, that the premises in controversy were never in fact dedicated to the public by Jonah H. Case, previous to the year 1855, and if they believe that was the time when the City of Rock Island first took possession of the block of ground in controversy, and the time when the City first claimed that there had been a general dedication of the block for public use, then the mere acquiescence of Case in the adverse possession of the City, from 1855 to the time of his death in 1863, would not of itself be sufficient to bar the plaintiff from recovery; such adverse possession, to bar the plaintiff, would have to be at least 20 years. [*Record, p. 29.*

3. On the question of dedication the Jury should consider the acts and sayings of Case, not only at the time of the sale of lots in 1836, and in 1841, and

1842, but his subsequent acts and sayings, also, down to the time when possession was taken by the City. [*Record, p. 29.*

4. The intention to dedicate land to the public use, is not to be inferred from doubtful acts and expressions, but must be clearly and unequivocally proven. [*Record, pp. 29–30.*

5. A special dedication, or a dedication for a special purpose, is a very different thing from a general dedication for public use; and if the Jury shall believe from the evidence, that down to the year 1855, there had been only a special dedication of this land, for Schools and Churches, then the City had no right to take possession of it at that time, for any other purpose, nor to hold it subsequently, for general public use. [*Record, p 30.*

6. On the question, as to whether there had been a general dedication, previous to 1855, the Acts of the Common Council of the City of Rock Island, in purchasing of the Methodist Church, and of Spencer, and of attempting to purchase of the School Trustees, may be considered by the Jury, who are to determine how far such acts are consistent with a general dedication. [*Record, p. 30.*

7. If the Jury believe, from the evidence, that the dedication, if any, in this case, of the premises in controversy, made by the original proprietors, was a special dedication, for the use of Churches and Schools, and that afterwards, the City of Rock Island, the Defendant, undertook to purchase the interests of said Churches and Schools in said premises, or the interests of any of

them, for the purpose of diverting the property to any other than Church and School purposes, that in such event, the defendant obtained no title, through or by reason of any such attempted purchase. [*Record, pp. 30–31.*

8. If the Jury believe, from the evidence, there was a special dedication of the premises in controversy, for Churches and Schools, by the original proprietors, and that, after such dedication, the said Churches and Schools, or any of them, either abandoned or undertook to sell out their respective interests in said premises, or convey the same by deeds to the defendant, to be diverted to any other use than for Churches and Schools, that in such event no title passed by such sales or deeds to the defendant, but the property reverted to said original proprietors, their heirs or assigns. [*Record, p. 31.*

The following are the portions of the Charge of the Court, which were given instead of the foregoing Instructions:

In Lieu of Plaintiff's First Instruction.

"In the case of an implied dedication, where there is no affirmative act on the part of the owner, the law usually, and in the (this) State, unequivocally requires, that the possession should continue, by the public, for at least twenty years; and it takes that time for the presumption to arise, or to be created, that a grant has been made, or a matured intention to dedicate, has been arrived at by the owner." [*Record, p. 37.*

Also the following; "If the public, without the consent of the owner, enter into the possession of his

land, and he simply acquiesces in it, and there is no overt or affirmative act on his part, then the possession must continue for the period of twenty years." [*Record, p. 38.*

In Lieu of Plaintiff's Fourth Instruction

"Dedications are of two kinds; express and implied.

"An express dedication is usually made, either by a deed, or by such express and unequivocal and affirmative acts, as show the intention of the party to make the dedication.

"While an implied dedication may take place, with no express act on the part of the owner of the land, but from the fact that the public take possession of a man's land, and use it for such a term of years, without any objections interposed by or from him, as to raise the presumption in law, that he intended to allow the public to use it; in other words, to allow the land to become dedicated to the public." [*Record, pp. 33-4.*

In Lieu of Plaintiff's Fifth Instruction.

"Much has been said, or something has been said, in the course of the trial of this case, in regard to a special and general dedication. There is but little distinction in the law between them. In one, a dedication may be more broad and comprehensive, than in the other; but that is about all the distinction there is. For instance, one man may dedicate a piece of land for the purpose of a church or a school-house, or a court-house. Then the public have no right to use it for any other use than the specific purpose, under which he makes the dedication or grant

"But if a man sees fit to donate a piece of land to the public, as a public square, generally, or for general public uses, then the public have a right to use it in a more extended and a more general way, than in a special dedication, to which I have referred. And that is the only essential distinction between a special and a general dedication.

"The public are at liberty to take from a private owner, if he sees fit to donate to the public, for the purpose, land for any of the general uses, which the public, as such, have any occasion to use land, such as for parks, public grounds, court-houses, churches, public buildings of any character, and for highways or streets; and for these general reasons they may hold, and use and own the land. Whenever the public ceases to use the property, for the purposes for which it was dedicated, then the right of the public ceases, and the title reverts." [*Record, p. 35–36.*

There were no Instructions or Charge of the Court in lieu of the Third, Sixth, Seventh and Eighth Instructions asked for by Plaintiffs Counsel.

III. *That the Court below erred, in charging the Jury, on the trial, as follows:*

1. In giving the following Instructions to the Jury, in said charge, the same being inconsistent with the First and Fourth Instructions asked for by Plaintiff's Counsel, and inconsistent with the law as laid down by the Court below, as well as contrary to the law, and tending to mislead the Jury:

a. "Here it is not claimed that there is any such

noting or marking on the plat, as amounts to a donation or dedication of the square in controversy, under the statutes But while the plat is not of itself, under the law, to be considered as a grant or conveyance to the public, there are certain *indicia* upon its face, which you have a right to consider, as circumstances tending to show an intention to dedicate. For instance, the square is not numbered as the other squares in this plat are numbered. It lies unnumbered between seven (7) and nine (9). The lots in the blocks facing the square, are made to front upon it, and in a different manner from what the lots in the other blocks front, as you will see by examining the plat, and in the squares surrounding this block, the alleys separate these squares, differently from what they do the squares which do not front upon this block; showing an apparent intention that the lots should front upon this square.

"It may, I think, be pertinently asked. if these owners intended to retain this square as private property, why did they not number it in consecutive order, with the other blocks contained in the said square? And so, too, it may be asked, why did they make this change in the frontage of the other lots?" [*Record, p. 38–39.*

b. "So, too, the fact that the block has never been returned by either Case or Spencer or McKay for assessment and taxation, and has never been so assessed or taxed, is a circumstance of much significance, as tending to show, not that they no longer considered themselves as owners, but that the public authorities deemed the square to be public property, and as such, not liable to taxation." *Record, p. 39–40.*

c. "And so also, (significant) is the testimony tending to show that from about the year 1855, the City of Rock Island took possession of this square, and made improvements thereon, treating it as one of the public squares of said City, without objection from Mr. Case, although he lived, for about ten years afterwards, and in the immediate vicinity of the City, at the time. This acquiescence on his part, in the assertion by the defendant of a right to control this square, like all the other acts shown in the testimony, tends to show only that he considered the City the owner of this property." [*Record, p. 42.*

2. In giving the following Instruction, as not only inconsistent with the Fifth Instruction asked for by Plaintiff's Counsel, but as suggesting to the Jury, improperly, a mode of explaining a portion of the evidence of the plaintiff, instead of leaving such evidence to have its due weight upon the minds of the Jury.

"On the part of the plaintiff it is contended, that the only dedication intended by Mr. Case, was a special one, to the use of the public, for schools and churches. And there is testimony in the case tending to show, that in his conversation with some persons, Mr. Case stated that this square was for the use of schools and churches; and as it is claimed by the plaintiff, in corroboration of this theory of a special dedication, certain conveyances made by Mr. Case and his co-owner, to a Baptist Church and a Methodist Church, and to the School Trustees, of portions of this block, are put in evidence, all to be considered and weighed by you.

"All this it is your duty to consider with the other testimony, as tending to throw light on the intention

of Mr. Case, in regard to the purposes to which this block was to be applied. It is possible that he may have considered, that the temporary occupation of parts of this block, for church or school purposes, was not inconsistent with the general right of the public to use the property as a public square. He may have thought, for the time being, the best use to be made of a public square, was to put public buildings, like churches and school houses upon it; with the right, however, of the public at large, whenever they saw fit to act through the City authorities, to remove these structures therefrom, and occupy the square for other purposes. This may have been the view with which Mr. Case made the deed to these Churches, and these School Trustees; with the idea that in so doing, he was not interfering with the general right of the public to use this square, but only consenting to this use, for the time being." [*Record, p. 42-43-44.*

IV. *That the said Verdict and Judgment are manifestly against the law and the evidence, and the Court erred in not setting the same aside.*

1. There was no Acceptance of the Block by the City.

2. The proprietors are not to be estopped by loose and doubtful expressions, against record evidence of their intentions.

3. The purposes of the intended donation or special dedication having failed, the property reverted to the proprietors.

I.

Portions of the depositions of Connelly and Harson, were improperly admitted.

The evidence was material, relating, as it did, to what was claimed to have taken place, and to have been said by the proprietors, at a sale of lots in 1836; [*Record, p. 21;*] and which if true, had an important bearing on the question of dedication.

Powars had made a deposition, which had been read on a former trial. Powars had then died, and Connelly's deposition was taken to prove what Powars had sworn to. Harson's deposition was taken for the same purpose. Also to prove the contents of the deposition of one Hibbard Moore, another deceased witness, whose deposition was used on a former trial, but the materiality of whose testimony does not appear.

In the first place, the Court will notice the vague and uncertain character of this testimony, which is hearsay in the second degree. Connelly and Harson say what Powars said, as to what Case said in 1836.

The rule admitting such evidence, is an exception to the rule against hearsay evidence, and is to be narrowed in its application.

"Courts of Justice," said the U. S. Supreme Court, in *Lea vs. Company, 21 Howard, 504*, "lend a very unwilling ear to statements of what dead men had said." Here, not only was Powars the witness dead, but Case also, whose declarations at the sale, were sought to be established. It was a statement as to what a deceased witness had said, as to what had been

said by a man who had died before the deceased witness testified.

The witnesses Connelly and Harson only undertake to give the substance of the testimony of the deceased witness. They say they cannot give the exact language. Nor did they undertake to give the language of the deceased witness, substantially. It was the substance of the *testimony* which they gave, [*Record, p. 21-22,*] that is, the substance of what they conceived to be the testimony.

It was vitally important to get the exact language of Case, spoken in 1836.

It was equally important that the exact words and language of the deceased witness should be reproduced, for he had deposed to the language of Case, uttered in 1836.

When it is essential that the exact words be given, the rule requires that the identical language of the deceased witness be reproduced. *1 Phil. Ev., 4th Am. Ed. 401.*

The rule laid down in the first and leading English case cited by Lord Kenyon, in *Rex. vs. Foliffe, 4 T. R. 290,* that the witness must give the exact language, is followed by the Federal Courts, in

United States vs. Wood, 3 Wash. C. Ct. 440.
Bennett vs. Adams, 2 Cranch, C. Ct. 551

In the United States vs. Wood, Mr. Justice Washington said: "The evidence is admissible, provided the witness can repeat the testimony which Hare (the deceased witness) gave, and not merely what he conceives to be the substance and effect of it, of which

the jury alone ought to judge. He may refresh his memory from notes which he took of the evidence at the former trial, but he must be sure of the accuracy of his statement, from his recollection, and not from confidence merely, in the accuracy of the notes."

To the same purport are

Lightner vs. Wike, 4 S. & Rawle, 203.
1. Phillips Ev. 4th Am. Ed. p. 396-397, and Note.
Wilbur vs. Selden, 6 Cowen, 165.

This rule was violated in the Court below. The deposition admitted in evidence, shows that Connelly, instead of testifying from memory, was reading from his notes. He used the present tense in giving his testimony, at the same time, holding the notes in his hand, and saying that he stated what appeared from said notes. [*Record, p. 21–22. 1st Assignment of Errors.*

In *Wilbur vs. Selden, 6 Cowen, 165*, Savage, C. J. said: Chief Justice Tilghman, in *Lightner vs. Wike, 4 Serg. & Rawle, 203*, shows very satisfactorily the reason of the rule, requiring the language of the deceased witness, and not the substance of his testimony, and also that notes of counsel should not be relied on, as it is not their practice to take the words, but the substance, as they understand it. And he remarks that during a trial, the ideas of counsel pass through a medium, which diverts them from a right line.

Also see *Commonwealth vs. Richards, 18 Pick*, 434. "In general, the taker of notes condenses the words of the witness into what he supposes to be the substance. But the partiality of counsel inclines them to view

every thing in a light favorable to their cause." [*4 S. & Rawle, 205*

Connelly was counsel for the City, when he took his notes, and at the former trial. [*Record, p. 21.*

Again, the rule requires the language of the witness as given at the trial. That branch of the rule was violated also. The "substance of the testimony" of Powars, not at the trial, but at the time when the deposition was taken, is what was given by Connelly and Harson. But that is, or may be, a very different thing. Portions of the deposition may have been objected to, and ruled out; and the witnesses may be reproducing testimony which was not used on the trial, at all.

We claim, then that Connelly's testimony was improperly admitted, for the following reasons:

1. Because the testimony related to a deposition as it was when it was given by the deceased witness, and not as it was when used at the trial.

2. Because the witness gave, not the words of the deceased witness, either verbatim or in substance, but the "substance of the testimony."

3. Because the witness did not testify from recollection, but from his notes.

4. Because Connelly, who undertook to thus give the substance of testimony, from his notes, was an Attorney in the cause.

Also, that Harson's testimony was improperly admitted for the first and second reasons above given.

II AND III.

In considering the instructions, let us examine the law of dedication; and see whether the views of the Court below are correct in principle, and sustained by the authorities.

A. *The intention to dedicate land to the public use, is not to be inferred from doubtful acts and expressions, but must be clearly and unequivocally proven.*

Washburn on Easements, 3d Ed. p 186.
Curtis vs. Keesler, 14 Barb. N. Y., 522.
Kelly vs. City of Chicago, 48 Ill., 390.
Morrison vs. Marquardt, 24 Iowa, 35.
Irwin vs. Dixion, 9 Howard, 30.

In the last case cited, Justice Woodbury said the acts and words must not be equivocal or ambiguous.

How do the instructions of the Court below square with this principle of law?

The fourth instruction asked for by counsel for plaintiff, worded as above, in the precise language of the authorities, was refused, and what was given in its stead?

The general principle of law laid down, was in the following language:

"An express dedication is usually made, either by a deed, or by such express and unequivocal and affirmative acts, as show the intention of the party to make the dedication." [*Record p. 33. See 2d Assignment of Errors.*

Thus, by the word "usually," leaving the Jury to infer, that there might be an express dedication, not evidenced by express, unequivocal and affirmative acts.

In applying the principles of law to the facts of this case, various circumstances were called to the attention of the Jury, as evidence of dedication, many of which were ambiguous, and none of them of that clear and satisfactory character, which the law requires.

1. The evidence tending to show that some lots were sold, in 1836, fronting on this ground as on a public square.

The only evidence of this, was that which we have endeavored to show, was improperly admitted. And here we might remark upon the improbability, that the City authorities, if they knew this block had been dedicated to the public, would have permitted the title to such an important piece of property, to rest upon the memory of witnesses, as to what took place at a sale of lots. They knew that the property had not been dedicated by the plat; and if they relied upon a dedication by parol, why did they not then take possession?

But even if there were legal evidence in the case, of such representations at the sale, the authorities are abundant that such a sale of lots does not of itself constitute a dedication to the public use.

Simmons vs. Mumford, 2 R. I. 184.
Chapman vs. Gordon, 29 Georgia, 250.
Baker vs. Johnson, 21 Mich. 348

"Such sales," said the Court, in Baker vs. Johnson, "have no tendency to prove an acceptance by the public, or an estoppel in favor of the public."

"Purchasers by a plat must understand upon what conditions public spaces are promised by it; and if the public do not accept the grant, there has been no violation of the grantor's implied covenant." *21 Mich., 348.*

In *Simmons vs. Mumford*, the principle was broadly asserted, that such a sale "gives no right to the public." *2 R. I. 184.*

In some cases, deeds given at such sales, are held to confer a right of way. Where, also, there is other evidence, and afterward an acceptance, such sales are considered corroborating evidence of dedication.

But here, as we shall endeavor to show, in another place, there was no acceptance.

In this record, there is no evidence that the proprietors, or either of them, ever conveyed lots as fronting on a public square. The only deed executed by any of them, wherein it was called a public square, was the one to McKay; and the explanation of the use of the phrase in that deed, is, that Spencer and Case, intending to devote the block to Schools and Churches, [*Record, p. 28,*] as between them and McKay, it would be public. The object no doubt was, to prevent McKay, to whom they were conveying one-fourth interest in the Addition, from interfering with their contemplated donations of this block. If it had been actually dedicated, why include it at all, in the deed to McKay?

The same fact, as to the expected use of the block, would explain any reference to it at the sale, as a public square, if any such reference was made.

In *Chapman vs. Gordon*, lots were sold near property

marked on the plat as sites for Churches, with the verbal announcement that they were always to be for Churches. Held, not sufficient to constitute dedication. *29 Georgia, 250.*

2. The fact that the block was not assessed for taxation.

This was deemed of so much importance by the Court below, that it was twice referred to in the charge, and was particularly impressed upon the minds of the Jury. [*Record, p. 39 and 45.* But this circumstance, in itself unsatisfactory and insufficient evidence of dedication, was in this case fully explained by the fact, that the block was intended for Schools and Churches.

This intent was doubtless known to the public authorities. If they did not insist upon taxing the block, it was very natural that Spencer and Case should not feel it incumbent on themselves, to take any steps to have subjected to taxation, property which they stood ready to give away for religious and educational purposes. If used for these purposes, it would not be taxed; *Revised St. of Ill., 1845, p. 437*; and if, pending its acceptance, the public was deprived of the taxes, so were the proprietors deprived of the use of the land.

3. The fact that lots were laid out, fronting on this block of ground, and that the alleys ran differently in those blocks adjoining this one, was commented upon by the Court below, as evidence of dedication. [*Record, p. 38–39.*

This was entirely consistent with the purposes which the proprietors had in view. By the plat hereto

attached, which corresponds with the map in the record, and with the evidence, the Court will see that the block, which is 300 ft. by 320, will admit of four squares on the four corners, of 135 ft. each, leaving two streets through the center of the block, one 50 ft. wide, and the other 30.+

These four corners were intended for Churches, and the center for Schools. [*Record, p. 28.*

In accordance with this intent, April 21, 1843, N. W. corner was conveyed to M. E. Church; April 28, 1843, N. E. corner was conveyed to Baptist Church; July 28, 1849, a portion in center to School Trustees; and July 28, 1849, the 50 ft. street was conveyed to "all persons concerned in the open and unnumbered square in the Upper or Spencer and Case's Addition." Who were they? Manifestly those sending to School, and attending the Churches. And it was for their convenience in going to and from, that the alleys were laid out differently in the adjoining blocks. That circumstance, therefore, was no evidence of dedication to the general public. This instruction was error.

4. The fact that the block was not numbered on the plat, was given to the Jury as a circumstance tending to show an intention to dedicate. [*Record, p. 38–39.*

That was no evidence of dedication.

Cowles vs. Gray, 14 Iowa, 5.
Pitcher vs. N. Y. & Erie R.R. Co, 5 Sand, 608.

In *Cowles vs. Gray,* Justice Lowe said: "It was clearly competent for the proprietors, in laying off a town on the river, to withhold from the public use, whatever ground and wherever situate, that they may

+ Probably the Blocks were intended to be 320 ft square; in which case each center street would be 50 ft wide. The Plat is indefinite. 6 B 40

choose; and as a matter of law and fact it is withheld, unless affirmatively it appears to be set apart for the public use." *14 Iowa, 5.*

"There is a manifest distinction," says the Court, in *Pitcher vs. N. Y. & Erie R.R. Co.*, "between a dedication and a mere reservation of land; which was admitted by the learned counsel for the plaintiff. The former is irrevocable, and the owner has no power or control over the property inconsistent with the terms of the dedication. The latter imposes no obligation on the owner; his control over the property continues, and he may exercise the right of an owner as fully as he could before. Its actual application to public uses, as for the site of a court house or jail, an alms-house or any other similar purpose, especially when the reservation is made by a municipal corporation, does not deprive the owner of the right of resuming the entire and absolute disposition and control over it, when no longer wanted for the purposes to which it has been applied." *5 Sandford, 608.*

But further: There was a statute of Illinois, which required the proprietors, in such case, to designate on the plat, the property intended for public use.

The law was passed Feb. 27, 1833. *Gale's Statutes, p. 676.*

SECTION 1. Provided for making and recording the plat, and that the plat, or map "shall particularly describe and set forth all the streets, alleys, commons or public grounds."

SECTION 5 reads as follows: "The plat or map, when made out, certified, acknowledged and recorded, as required by this act, every donation or grant to the

public, or any individual or individuals, religious society or societies, or to any corporation or bodies politic, marked or noted as such on said plat or map, shall be deemed in law and equity a sufficient conveyance to vest the fee simple of all such parcel or parcels of land as are therein expressed, and shall be considered to all intents and purposes, as a general warranty against such donor or donors, their heirs and representatives, to the said donee or donees, grantee or grantees, for his, her or their use, for the uses and purposes therein named, expressed or intended, and for no other use or purpose whatever. And the land intended to be for streets, alleys, ways, commons, or other public uses, in any town or city, or addition thereto, shall be held in the corporate name thereof, in trust to, and for the uses and purposes set forth and expressed or intended." *Gale's Statutes, p. 677.*

If this block had been intended for a public square, or for any other general public use, it would have been so marked on the plat, as the law required.

It was not so marked. The title remained therefore, in the proprietors. Though intended for Schools and Churches, if suitable donors should present themselves, who would accept and use it for those purposes, the proprietors preferred, for the present, to retain the title in themselves. Hence the block was not marked on the plat.

The streets were marked, and as evidence that they were satisfactory to the public, the plat was acknowledged by the County Commissioners. *Record, p. 18.*

Under this state of facts, in face of this law, requiring

all public grounds to be so designated on the plat, and in the face of the plat, showing that this block was not marked as a public square, or for any public use, how can the leaving it unmarked or unnumbered, be any evidence of dedication? And was not this instruction clearly error?

So far from its being any evidence of dedication, the fact that the block was not marked at all, is evidence that it was not dedicated to the general public.

5. The fact that Case remained silent for eight years, after the City took possession, in 1855, was given to the Jury as evidence of dedication. [*Record, p. 42.*

This was clearly erroneous.

The City did not take possession until nineteen years after the time when, it is claimed, a dedication was made; and even then not as an acceptance of a dedication. The City first bought out the Methodist Church, or tried to; (the Church had nothing to sell,) and obtained, by deed from Spencer, a good title to the undivided three-eighths of the block; then took possession. The deeds were made in April, 1855; possession the same year.

The possession of the City was Case's also; they were tenants in common.

The City having taken possession, when it afterward claimed title to the whole, that was an ouster, which would enable Case to maintain ejectment.

Carpenter vs. Thayer et al, 15 Vt., 552.
Laws of Ill. "*Eject.*," *Pur. St.* 1856, p. 506, s. 21.

But there was no ouster, nor was the possession ad-

verse, until the City claimed title to the whole block; and there is no evidence in the record, to show that at any time previous to the commencement of this suit, the City claimed title to the whole, or made any claim that the block had been dedicated to the general public, for a public square, or for any other purpose.

But conceding, for the sake of the argument, that the possession was adverse from 1855; then how does the case stand?

Like any other case of adverse possession; and the law is well settled, that the holder of the better title has a right to lie by twenty years.

Washburn on Easements, 3d Ed. p. 178.
Jennings vs. Tisbury, 5 Gray 75.
Gentleman vs. Soule, 32 Ill., p. 278.

In *Gentleman vs. Soule*, Justice Walker speaks of twenty years as the "shortest period within which the right can be acquired" by prescription. *32 Ill. 278-9.*

Here the time was but eight years before Case's death, and five years afterward, before suit was commenced.

That this was the law in Illinois, was conceded by the Court below. [*Record, p. 37.*

But the Court refused to give plaintiff's first instruction; thus refusing to apply the law to this case.

Wherein does this differ from any other case of adverse possession; or what is there to take it out of the rule?

The Court below commented upon the fact, that the evidence showed that Case lived near Rock Island.

But what matters it where he lived? If his place of residence was of any consequence, then defendant should have gone further, and should have shown that Case was at home during the time. But it is immaterial where he lived, or where he was. If he had not parted with his title previous to 1855, when the City took possession, then he had a right to lie by twenty years.

B. *On the question of dedication, all the acts and declarations of Case, down to the year 1855, should have been considered.*

Proctor vs. Town of Lewiston, 25th Ill., 153.

This was substantially plaintiff's third instruction; [*Record, p. 29*. It was refused, and nothing equivalent was given. This again was error. The acceptance, if any, was in 1855. Until then, it was competent for the proprietors to revoke the dedication, if any had been made, or to qualify it in any way they chose. All their acts and declarations, therefore, upon the subject, previous to 1855, should have been considered by the Jury.

C. *All the authorities go to show that a special cannot be diverted into a general dedication.*

Here, if there was any dedication at all, which we deny, it was special.

Yet plaintiff's fifth, seventh and eighth instructions, asking that the jury be instructed that the City acquired no title from the Church, in 1855, were all refused, [*Record, p. 31*], and though some general Instructions were given as to the difference between a general and special dedication, no allusion was made by the Court, in his charge to the jury, to the proceedings of the City

Council in attempting to purchase the interest of the Methodist Church

This refusal to instruct, at the request of plaintiff's counsel, as to the effect of that transaction, was error.

D. *The acts of the Common Council of the City, in obtaining conveyances from the Methodist Church, and from Spencer, in 1855, were competent evidence on the question of dedication.*

They tended to show that the City authorities did not consider this as public property, previous to 1855. But the Sixth Instruction asked for by plaintiff, [*Record p. 30,*] that those transactions might be considered by the jury, who were to determine how far such acts were consistent with a general dedication, was refused, [*Record, p. 31,*] and no allusion to these transactions, was made in the charge. This, also, is assigned for error.

IV.

The Verdict and Judgment were against the Law and the Evidence.

A *There was no acceptance of this block by the City, and hence no dedication to the public, even if one had been intended.*

An acceptance is necessary.

McMannis vs. Butler, 51 Barb. 436.
Cowles vs. Gray, 14 Iowa 6.
Gentleman vs. Soule, 32 Ill. 280.
Wash. on Easements, 3d Ed. 181–185, 210–224
Green vs. Chelsea, 24 Pick. 80.

Baker vs. Johnson, 21 Mich. 320.

Manderschid vs. City of Dubuque, 29 Iowa 73.

"If it be a distinct square, not intended for a passage way, there must be, if it is in a city, an acceptance of it by the city officers, or public agent." *Washburn on Easements, 3d Edition, p. 224*, citing the case of *Baker vs. Johnson*, in which a proffered dedication was revoked, after nineteen years, on the ground that there had been no acceptance, though the ground was marked "public square" on the plat.

In the case before the Court, there is no pretense that there was an acceptance previous to 1855

The possession in 1855 was no acceptance, because that possession was taken under the deeds from Spencer and the church.

Is the Court willing to ignore those deeds, given in April, of the same year, and say the possession was taken as an acceptance of a dedication made nineteen years before?

B. A dedication is sought to be made out, by the fact that there was evidence tending to show that this was sometimes called a public square. But,

There being record evidence of the intentions of the proprietors, they are not to be estopped by verbal declarations, and especially not by loose and doubtful expressions.

Simmons vs. Mumford, 2 R. I., 172.
Grant vs. City of Davenport, 18 Iowa, 179
Kelly vs. City of Chicago, 48 Ill, 390.

In *Simmons vs. Mumford*, it was held, that calling

a piece of land a "street," was not sufficient evidence of dedication. [2 *R. I., 184.*

The use for which this block was intended, would explain such reference as may have been made to it.

Though this was sometimes called a public square, that was not the usual designation. The Court below speaks of it as "the parcel of land usually known and described as 'Union Square,' or 'Church Square.'" [*Record, p. 31.*

C. *The purposes of the intended donation or special dedication having failed, and the property not having been accepted and used for the purposes for which it was intended, it reverted to the proprietors.*

Commonwealth vs. Fiske, 8 Metcalf, 238.
Board of Education vs. Inhabitants, 15 Ohio, 221.
Lee vs. Lake, 14 Mich. 18, Justice Cooley.
Daniels vs. Wilson, 27 Wis., 495.
Pitcher vs. N. Y. & Erie R.R. Co., 5 Sand, 608.

In *Lee vs. Lake*, which was a case in some respects analogous to this, Justice Cooley said:

"From the time when the court-house and county offices were located in another part of the village, nothing appears from which we can infer an intent to appropriate this square as public property, even if such an intent could have been gathered from the prior use." *14 Mich 18–19.*

In *Pitcher vs. N. Y. & Erie R.R. Co.*, the Court said that the actual application of the property to public uses, does not deprive the owner of the right of resuming the

entire and absolute disposition and control over it, when no longer wanted for the purposes to which it has been applied. *5 Sand, 608.*

In *Board of Education vs. Inhabitants,* there was the unanimous opinion of the five Judges of the Supreme Court of Ohio.

The case was as follows:

The original proprietors of the Village of Van Wert, by a town plat duly acknowledged and recorded in May, 1835, dedicated two town lots "for school purposes and on which to erect school houses." The proper authorities soon after erected a school house on one of the lots, and occupied the same, in conformity with the purposes of the dedication, till the year 1855. Then the street leading to said lots, was occupied by a railroad company, as part of the line of its railway; and the company constructed a depot in close proximity to said lots, thereby rendering them worthless as sites of school buildings.

The Board of Education filed a petition, asking from the Court authority to sell said lots, and apply the proceeds of sale to the purchase of sites for additional school buildings or for the erection of such buildings.

SCOTT, J. "By the 8th Section of the Act of March 3, 1831, to provide for the recording of town plats, (*S. & C. 1484,*) it is provided: 'That the plat or map, when recorded as required by this act, shall be deemed and considered in law a sufficient conveyance to vest the fee simple of all such parcel or parcels of land as are therein expressed, named or intended for public use, in the county in which the town is situated, *for the uses*

and purposes therein named, expressed or intended, and for no other use or purpose whatever.'

"The town plat, in this case, was executed and recorded in 1835, and the result was, that the fee simple of the lots in question, was thereupon vested in the County of Van Wert, but wholly in trust for the public use specified in the dedication, *and for no other use or purpose whatever.*

"If subsequent legislation has changed the trustee, the trust or use itself remains unchanged. The dedication in this case, as stated in the petition, was, "for school purposes, and on which to erect school houses."

"Without determining whether, under this dedication, the lots could properly be used for school purposes other than the erection of school houses thereon, it is enough to say, that the dedication is of the *land*, and not of its value or proceeds. It confers no power of alienation discharged of the use, by which the purpose of the dedication might be utterly defeated. Should the sole uses to which the property has been dedicated, become impossible of execution, the property would revert to the dedicators, or their representatives." *18 Ohio, 226.*

By the condition upon which the property would revert, is not meant, an absolute physical impossibility; because no such impossibility existed in that case.

The meaning evidently is, if the property becomes, from any cause, as it had become in that case, unsuited to the purposes for which it was intended, and no longer wanted for those purposes. Such is the case now before the Court. What better evidence can be had of such

unsuitableness, than the fact that the property is abandoned by those for whom it was intended? They permit the City to take possession, and neglect, for thirteen years, to make any claim to the property, for the purposes for which portions of it had been conditionally conveyed.

Commonwealth vs. Fiske, 8 Metcalf. In 1804, Rufus Davenport and Royal Makepeace, for the purpose of making a large village, made considerable purchases of land, near the terminus of West Boston Bridge, on the Cambridge side. They soon after made provision for the erection of a meeting house, and in 1805, procured an act incorporating them for that object, by the name of the Cambridgeport Meeting-house Corporation. They also made provision for a court house, as it was expected to be removed from Old Cambridge.

In 1806, Davenport and Makepeace, with others, made a deed of certain land to the Cambridgeport Meeting House Corporation.

This deed contained the following provisions:

"On the conditions and for the purposes hereafter mentioned, and no other; to wit, the said corporation shall have a right to keep and continue a meeting house thereon, where the one now building stands; and to rebuild and enlarge the same, in any way, provided no part thereof shall ever be brought nearer than ten feet distance from said Columbia Street. The County of Middlesex or any other County within the limits of which said premises should hereafter be, shall have a right to build, and forever continue, a brick building on the premises opposite to the meeting house, viz.

(describing its location), and which building shall be for a court house and offices, for the purposes of said County, and for no other purpose whatever. Provided, however, that if said house shall not be built within ten years from the date hereof, then the said right to such County shall cease.

"There shall never be erected on the premises any other building, or in any other manner than as aforesaid, *and such part of the said land as shall not be so built on, shall be kept and remain an open area for public convenience.*"

There were some other directory provisions, and the habendum was, "to have and to hold the aforegranted premises, respectively, to the said Meeting House Corporation and to said County, their successors and assigns, in manner, on condition, and for the respective purposes aforesaid only."

In 1808, the members of the Cambridgeport Meeting House Corporation were incorporated into a parish, by the name of the Cambridgeport Parish, and in 1809, the Meeting House Corporation conveyed the land to the parish, to hold upon the same conditions.

The meeting house then built was used for years; but the court house was not located there as expected. The land was not enclosed, but lay open, and was passed over by the citizens at their pleasure In a few years, the meeting house itself was suffered to go to decay, and in 1833, it was taken down by the parish, and a new house was erected by them in another place, a quarter of a mile from the old site. Since that time, the parish had not occupied any part of the lot. It

was taken possession of by the defendants, who claimed title under the grantors to the Cambridgeport Meeting House Corporation.

The question before the Court was, what construction was to be given to the clause of the deed of 1806, which provides that, "such part of the land as shall not be so built on, shall be kept and remain an open area, for public convenience."

In deciding this question, the Court, Hubbard, J., said: "The design of the grantors was to provide a suitable piece of ground, for the meeting house, with sufficient space around it to make it both quiet and attractive; and also to offer to the County such a site for the court house and county offices, in an open square, to be rendered pleasant and grateful by shade trees, and freed from the annoyance of neighboring buildings, as might induce them to accept it. And if the County had accepted the grant, and erected their court house on the allotted premises, we have no doubt, as connected with it, the space of ground would have been dedicated for the uses intended by the donors. But we are of opinion that this dedication of an area for public use, was subordinate and incidental to the establishment of the public buildings.

"There was no design, that we perceive, to open a square for the use of the public, whether the buildings were erected or not.

"The terms here used, "public convenience," are connected with and qualified by the other terms, referring to the buildings to be erected; and the convenience provided is for those who have occasion to use the buildings.

"If the object had been to open and dedicate a public square, it would, we think, have been provided for specifically, and would have been secured by the habendum in the deed; and the right to erect certain public buildings upon it might have been also granted as an incident. But the reverse is the case."

"The contemplated objects have failed to be accomplished, and the incidents, connected with those objects, must fail with them."

"If the area had been fenced out and the trees planted, and a square maintained, while the meeting house existed, a question of fact, as to the dedication of it to the public, in consequence of the use, might perhaps have arisen." *8 Metcalf, 238 et seq.*

If the principles of law recognized in the foregoing case, and in the others cited, be applied to the case before the Court, where will the title to this block be found to be?

Plaintiff is the grantee of the heirs of Case, and unless the title passed from Case in his life time, the title to the undivided three-eighths of the block is in the plaintiff.

Did the title pass from Case in his life time, and if so, when?

Let us examine the facts historically.

1836. The land, the title to which was in John W. Spencer and Jonah H. Case, was laid out and platted, and the plat was acknowledged and recorded. On the plat, the block was not numbered, nor was it marked as a public square, as the law required, in case it was intended as such.

The title did not then, pass by the plat, nor was there any dedication by plat.

But there was a sale of lots about that time, and there is some evidence, though as we claim, improperly admitted, that this was spoken of, at the sale, as a public square. The plat having been recorded in May, 1836, it is fair to presume it was used at the sale.

Is it reasonable to suppose that purchasers would buy lots on the faith of representations contradicted by the plat itself? Would they not have asked, if this was a public square, why was it not so marked on the plat? And will the Court take as evidence of title, the memory of witnesses as to what took place, and what was said, thirty years before they testified, as against written evidence placed upon record at the same time? It is against public policy, that witnesses should be permitted in that way, to impeach the public records, and especially, after so long a time has elapsed.

Again: If there was a dedication in 1836, the proprietors had no right to convey afterward. But they made numerous deeds, and their right to convey was recognized by the city itself, as late as 1855, when they gave the Methodist Church $2500, for a quit claim deed of an interest acquired subsequent to 1836.

It may be safely assumed, then, that the title was, in 1836, still in Spencer and Case, after the sale of lots. That would be the case, even if the representations made at the sale were sufficient to constitute dedication; because there was as yet, no acceptance, and the title would not pass, till then.

1837. Spencer and Case convey to Benjamin McKay, the undivided one-fourth of the Addition, including this block.

1843. Spencer and Case convey to the Methodist Episcopal Church of Rock Island, a portion of the block in the North West corner. McKay does not seem to have joined in this deed. It was a deed, with words of limitation. The conveyance was "in trust for said Church or Society, and for no other use." [*Record, p. 26.*

The same year, Spencer and Case and McKay convey another portion, this time in the North East corner, to the First Baptist Church or Society of Rock Island. This deed, too, has a condition. The conveyance was in trust for said Church, "so long as said Church or Society as Trustees shall hold said premises." [*Record, p. 26.*

1849. Spencer and Case conveyed a portion of the block, in the center, to the Trustees of Schools, of Frl. Town. 18 N. R. 2 W., "for the use of Schools."

The same year, the conveyance is made, of the 50ft. street through the block, "to all persons concerned in the open and unnumbered square," &c.

Here were conveyances running through thirteen years, made from time to time, by these proprietors, of portions of this block; the whole block having been left blank on the plat. And yet we are told, that during all these years, it had been dedicated to the general public. Is not the claim preposterous?

The title now stood, partly in Spencer and Case and McKay, partly in the School Trustees, and partly in

the two Churches; provided any title passed by the deeds last mentioned.

The evidence of subsequent abandonment by the Churches and School Trustees, is so clear, that we have not deemed it necessary to examine critically into the precise nature of the estate, if any, which passed by these deeds.

The record does not show that these proffered donations were ever accepted, or used for Schools or Churches, or even that the deeds were ever delivered. They were not introduced by the grantees, or by anybody in privity with them. The fact that such deeds had been executed, was proven, merely as part of the *res gestae*, relating to the question of dedication; to show that if there ever had been a dedication, it was special and not general, as claimed. [*Record, p. 26.*

If any estate passed, it was a determinable fee.

1 Washburn on Real Property, 3d. Ed. p. 77.
Crabbe's Law of Real Estate, 2135.
State vs. Brown, 3 Dutch N. J., 20.
Beach vs. Nixon, 5 Seldon, 36
Mary Portington's Case, 10 Co., 41.

"The term 'determinable fee,' is generic in meaning, embracing all fees liable to be determined by some act or event expressed to circumscribe their continuance, *or inferred by law, as binding their extent.*" *1 Wash. on Real Property*, 3d Ed. p 77.

This fee, if any existed, was determined by abandonment.

The attempted sale, by the Methodist Church, to the

City, in 1855, if not in itself a forfeiture, was the clearest evidence of abandonment; and the continued acquiescence of all these donees, for thirteen years, in the exclusive occupation of the property by the City, with no pretense that it was held for their benefit, is conclusive evidence of abandonment by all parties representing the Schools and Churches.

Let us continue the history.

1855. In April, John W. Spencer conveyed to the City, which gave it a good title to the undivided three-eighths.

The same month, the Methodist Church undertook to sell out, and to convey to the City. But the conveyance to the Church was only for its own use. The Church, therefore, could not legally sell anything to the City.

Having purchased of Spencer, and attempted to purchase of the Church, the City took possession.

1863. Case died intestate.

1868. His heirs conveyed to the plaintiff, who commenced an action of Ejectment against the City.

This is the history of the property.

We claim, First, that there was no general dedication; Secondly, that there was a contemplated special dedication, evidenced by the various deeds made subsequent to 1836, and by what Case had said in his life time, [*Record, p. 28*]; Thirdly, that this intention was never fully carried out; and Fourthly, as to the portions of the block conveyed to the Churches and School Trustees, the donations were abandoned by the donees, and reverted to the proprietors.

There remains only the 50 ft. street, the conveyance of which, on the authority of *Commonwealth vs. Fiske*, falls to the ground, when the main purpose of the donation fails of accomplishment. "The contemplated objects," said the Court, in that case, "have failed to be accomplished, and the incidents connected with those objects must fail with them."

The silence of eight years, on the part of Case, and of five years by the heirs, should have been construed favorably to them, as giving the Churches and Schools all that time to avail themselves of the contemplated donations.

On the contrary, the Court below charged the Jury directly and strongly, on this part of the case, against the plaintiff.

"This acquiescence," said the Court, "on his part, in the assertion by the defendant, of a right to control this square, like all the other acts shown in the testimony, tends to show only that he considered the City the owner of this property." [*Record, p. 42*.

This was certainly strong language to address to the Jury, under the evidence.

Did, then all the acts of Case shown in the testimony, tend to show only that he considered the City the owner?

Did he so consider when he recorded the plat, without marking the block to the public?

Did he so consider when he conveyed to McKay, the year afterward?

Did he so consider when, in 1843, he conveyed to

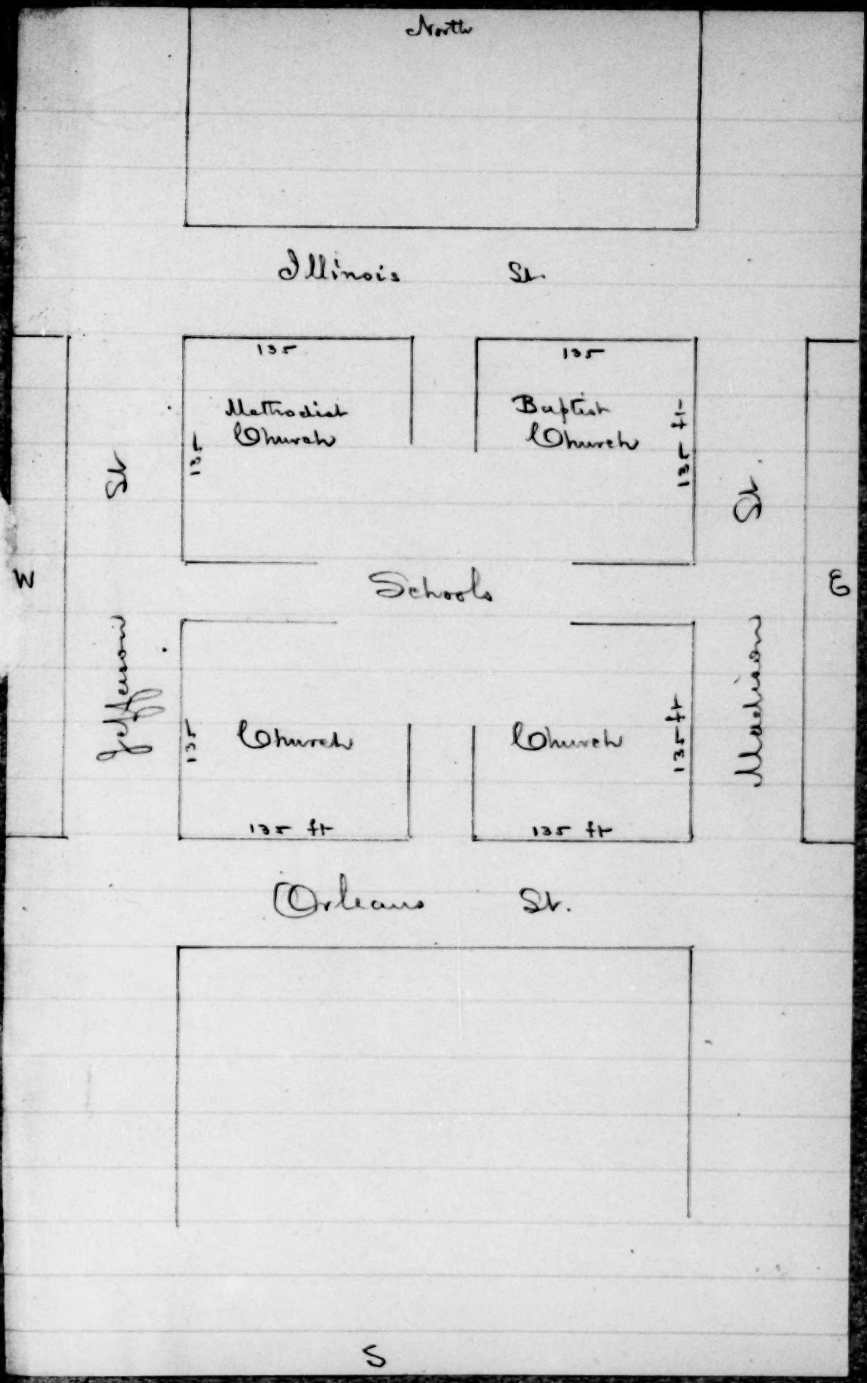
the Methodist Church, in consideration "of his great regard for the cause of religion and piety?" What right had he, at the public expense, to take credit for his regard for the cause of religion and piety? Or what right had he, as he undertook to do, in this deed, to limit the use of the property? What right had he to convey at all?

Did he so consider, when, the same year, he conveyed to the Baptist Church; and in 1849 to the School Trustees, and the same year, the 50ft. street, "to all persons interested in the open and unnumbered square?" Why say to all persons interested, if everybody was interested?

The fact is, Case manifested throughout, a generous intent to have a portion of his estate go to the advancement of education and religion. But the City authorities, instead of aiding to carry out this intent, put their heads together, to speculate in the property. It having cost nothing, the margin was ample. The City could make a small bonus to Churches and Schools, and take the block, worth nearly a hundred thousand dollars, [*Record, p. 25.*] and Case might whistle over his regard for religion and piety, and the education of the people, and over his block as well. All gone, by a sort of hocus pocus, at which he well might wonder.

It is for the Court to say, whether the law sanctions such a mode of obtaining property.

Charles B. Waite
Counsel
For Plaintiff in Error.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IN THE

Supreme Court of the United States.

October Term, A. D. 1878.

JOHN RUCH,
vs.
THE CITY OF ROCK ISLAND. } No. 640.

REPLY OP PLAINTIFF IN ERROR TO BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

I.

May it please the Court:

To the first point made in defendant in error's brief we reply that, even admitting that the substance of a deceased witness' testimony may be proven, yet in cases where it is *essential* to reproduce the exact language, the rule requires nothing less.

The learned author of Phillips on Evidence, who is inclined to believe that generally the substance of the testimony is sufficient, separates from the general rule the case in which it is essential to reproduce the very language.

1 Phil. Ev., 4th Am. Ed. 401.

It seems most essential in this case, if in any case,

to reproduce the exact language, for on it depends the title to real estate. Records and deeds are required by the law usually in evidencing title to real estate. A title depending upon ambigious words spoken by the dedicator many years ago, and now sought to be evidenced by hearsay in the second degree, ought to justify a strict enforcement of the rule.

The case of Mineral Point R. R. vs. Keep, 22 Ill. 19, hardly bears out the statement on page 9 of defendant's brief, that minutes of testimony taken by an attorney can be read to the jury as evidence.

In that case the minutes were read *without objection* to the jury, and the court after commenting upon the effect and weight of such evidence, the evidence having been admitted without objection, hold that the appellate court would not interfere; but that court also says (22 Ills., p. 19): "The rule is, and we believe has "never been departed from, that a witness may refresh "his recollection from his notes, *but cannot speak from "them, or give them in evidence.*"

II.

The third point in defendant's brief is that plaintiff has violated Rule 4 of this court, in that (1) no specific objection or exception was taken to any part of the charge of the court below at the time it was given, and (2) that the exception was general to the whole charge.

To this we reply that we have *not* violated Rule 4, either in letter or spirit.

It is true, the bill of exceptions contains the whole charge.

But Rule 4 does not say that the bill shall not contain the whole charge; it forbids the judge below from allowing any general exception to the charge as a whole, and our bill does not contain any exception to the charge as a whole.

This was a case in which it was necessary in the opinion of the court below, to incorporate the whole charge in the bill, in order to present intelligently the errors assigned to this court, in conformity with Sec. 3 of Rule 8 of this court, which requires "a complete "record of all proceedings in the court below without "reference *aliunde*, which are necessary to a proper "hearing above."

The court below demanded in justice to itself that the whole charge be inserted.

No "general exception" was taken to the charge as "a whole" (Record, p. 48).

The court below allowed exceptions on the trial to all portions of the charge variant from, and inconsistent with, the instructions prayed for and disallowed, and when counsel presented a bill of exceptions with the portions of the charge excepted to alone set out, the court below, in justice to itself, and in order to an intelligent hearing above, insisted on the whole charge being put in the bill, leaving counsel to specify and particularly designate the portions thereof under Sec. 5 of Rule 21 of this court. On this point we respectfully call the attention of your honors to the affidavits of counsel on file.

It will be seen from these affidavits that not only was exception taken by express permission of the court below to such portions of the charge as were inconsistent with the law as prayed for, but in the bill of exceptions, as originally drawn, these portions were specifically set out by themselves, and this first draft of a bill the court did not wish to sign. The context was necessary to get the full meaning.

We have complied with Sec. 5 of Rule 21, and set out in the assignment of errors the portions of the charge excepted to, *totidem verbis*. Rule 4 itself is a direction to the judges of courts below, more than to parties litigant, and counsel are in a measure helpless.

But the violation of this rule in any event does not in any way affect or prejudice the rights of the opposite party.

Its violation concerns (1) a duty to the court below, and (2) a duty to this court.

To violate it is considered unfair to the court below, because to point out exactly the objectionable matter in a charge when delivered might enable the court below to correct itself before the jury retire.

Harvey vs. Tyler, 2 Wall. 328.

Its violation is considered unfair to *this* court as thrusting upon it the increased labor of searching out the specific error.

Lincoln vs. Claflin, 7 Wall. 136.

Neither of these results has occurred in this case, even if there has been a technical violation.

For, by the instructions prayed for and disallowed, the court below had ample opportunity to correct its own erroneous impressions, and charge the jury correctly upon the law as contended for by plaintiff's counsel; all variations and doctrines *contra* were then and there excepted to, of which the court below then and there took notice.

There could be no injustice to the court below, even if that court had failed to insist on the bill as it now stands; but the court below did insist on the present bill.

There is no injustice done this Honorable Court; on the contrary, a *full record* of the charge is presented, necessary, perhaps, to a proper hearing in this forum, and in compliance with Sec. 3, Rule 8.

The errors in the charge, the portions inconsistent with the instructions prayed for, are specifically pointed out, *totidem verbis,* to this court in the assignment of errors.

Rule 4 was promulgated, if counsel are not mistaken, as early as the year 1800.

Subsequently, and on May 1, 1871, Sec 5 of Rule 21 was promulgated by this Honorable Court, it would seem, for cases like this, viz.:

When the errors run through the whole charge; when this court ought to have the whole charge in the record to refer to in order to a full understanding of the case; and when the court below insists on violating the letter of Rule 4 in justice to itself, then a compliance with Sec. 5 of Rule 21, *i. e.,* designating specifically *totidem*

verbis in the assignment of errors the portions of the charge excepted to satisfies any objection which this court might otherwise have to such a record and bill of exceptions.

The substance and *gist* of Rule 4 is against "a *gen-* " *eral* exception to the charge as a *whole,*" and not against incorporating the whole charge in the bill where necessary in justice both to this court and the court below.

This Honorable Court in earlier cases has animadverted only on *gross* violations of Rule 4. But laterly this court has laid more stress on a compliance with Sec. 5 of Rule 21.

Lucas vs. Brooks, 18 Wall. 436.

We respectfully call the attention of your honors to the language of the late Chief Justice Taney. in *United States vs. Breitling, 20 How. 254:*

"It is always in the power of this court to suspend " its own rules, or to *except a particular case from* " *their operation* whenever the purposes of justice re- " quire it."

Counsel who presents this reply, states to the court that he has read the affidavits on file relating to this matter, and knows the contents thereof, and that the matters therein set forth are true of his own knowledge.

III.

We must, in reply, notice some of the inaccuracies and somewhat careless statements in defendants' brief. A supposed "recital" from the deed made in 1855 by

J. W. Spencer to defendant is quoted at length on p. 15 of defendant's brief, seemingly for the purpose of calling attention to some newly-discovered evidence.

Nothing of the kind is in the record, and if it was, it is of no importance as showing the original intention of the proprietors. Whatever Spencer said, wrote, and did in 1855 when selling and conveying *his* interest in the square to defendant for money (it seems he *had* an interest worth buying at that time) is of no value as evidence against the plaintiff (who bought *Case's* interest), or even against Spencer, who long years before, by solemn deeds, had declared jointly with Case that the square was for use of churches and schools.

Counsel also, on p. 16 of their brief, mistake the record when they attempt to convey the impression that the court below charged the jury on request of plaintiff that this supposed "recital" was to be disregarded.

The court below gave no such instruction, as will be seen on reference to the record, nor did plaintiff ever ask any such instruction.

If counsel will so carelessly mis-state the record even, they can hardly ask to be regarded as accurate heralds of new historical matter.

Since the removal of this cause to this court, the opinion of the Supreme Court of Illinois in case of *Village of Princeville v. Auten*, 77 *Ills.* 325, has been published. That case, like this, was one where in platting a village a certain square was left blank without any mark or designation of its purpose; no evidence whatever appeared to show that the square was limited or conditioned to any particular public uses, and

the direct oral evidence of the original proprietors was introduced to show the particular object to which the square was to be devoted.

Under these circumstances the parol evidence was held to be admissible. The court says (*77 Ills., p. 329:* "Where nothing appears to indicate for what particular use a grant or donation of land is made to the public, we can see no reason why parol evidence is not admissible to show the object.

"Where the intention is made manifest by any *expression as to the use*, the dedicators *will not be permitted to show by extrinsic evidence* they intended a different public purpose. "

See also cases cited in Plaintiff in Errors' brief, p. 36.

There was in the case at bar record evidence, solemn deeds of the proprietors, placed on record, declaring the purposes of this square to be for churches and schools.

This high order of evidence was sought to be contradicted below by parol evidence of a different use and purpose, and that parol evidence consisted of supposed verbal declarations, and loose, doubtful expressions of the proprietors, *brought into court by hearsay.*

The introduction of this parol evidence was objected to (Record, pp. 22 and 24), but was not assigned as error on that ground, although it was assigned as error upon other grounds.

But this court will pass upon such an error, and take cognizance of it under Sec. 8, Rule 21, of the Rules of

of the Supreme Court of the United States, even if unassigned. Other erroneous statements in defendant's brief require some comment.

On p. 25, defendan't brief, the assertion is made that the defendant has "upwards of thirty years possessed "and controlled the premises in question."

Counsel are greatly mistaken—the record discloses the time to be less than twenty years. No attempt was ever made before in this case to show title by possession and lapse of time, or bar this action on that account. Counsel also mis-state the fact on p. 12 of their brief, in saying that the defendant took possession of the square in controversy before the year 1842.

The fact is, as is shown by the record, and as was generally conceded, that defendant *first* took possession in tne year 1855 (Record, pp. 28 and 42).

IV.

As against plaintiff's fourth assignment of error, defendant urges that it amounts to asking this court to review the refusal to grant a new trial, and to determine whether the jury decided according to the weight of evidence.

This is not exactly our position. While it is true that the mere overruling a motion for new trial cannot be assigned as error here, nor made ground for exception, yet the circumstances of this case are such as justifies the error assigned, and it will be noticed by this court.

We do not ask this court to review the facts presented in the record, except to draw therefrom conclu-

sions of law, and to judge if said facts are sufficient in law.

Questions of dedication of real estate are *mixed questions of law and fact,* never of fact alone, or law alone.

Like the case cited by defendant of *Insurance Co. v. Folsom, 18 Wall. 249,* this court will take into consideration the facts presented by the record, and dwelt on in the charge of the court below, to decide if there was any sufficient defence made out as a bar to plaintiff's recovery.

In *Waugh v. Leach, 28 Ill. 492,* the Supreme Court of Illinois says: "Dedication is a mixed question of "law and fact; surveying the land, etc., etc., amounted "in law to a dedication."

In *Insurance Co. v. Folsom, supra,* cited by defendant, objection was made to raising any point on questions of fact in this court. A motion was made to instruct the jury (in lieu of motion for non-suit) that certain evidence introduced by plaintiff *was not sufficient* to warrant the jury in finding for plaintiff.

This court held that a question of law was presented with the facts, which this court would review, and it was not like trying to make this court weigh evidence such as would come up in purely a review of a motion for new trial.

For instance, this court in *Train v. Dixon, 9 How. 30,* says; "Nor must the acts and words (showing in- "tention to dedicate land to public use) be equivocal or "ambiguous on that subject."

The court must consider those "acts and words" in order to make up an opinion upon the law, just as in *Insurance Co. v. Folsom, supra*, it was necessary to review the facts in this court to see if defendant was justified in asking a non-suit.

In the case at bar the position taken is that the omission to tax this square on the part of the city was a fact which in law constitutes an acceptance of the dedication by the city.

We say this is not law, for the omission to tax is a fact which shows that the city considered this church and school property, just as much as it shows anything else. Such property is never taxed.

Counsel for defense on p. 12 of their brief say; "The "continuous exemption from taxation and *keeping the "premises open for the use of the public"* showed an acceptance.

We must again call the attention of the court to this erroneous statement of facts. There is nothing in the record to show the "keeping the premises open to the "public." There never was any such thing shown on the trial, or attempted to he shown.

Counsel speak of this "keeping open the square to "the public" as "following immediately after the "dedication!" (brief, p. 12).

This is a radical error of fact on part of the learned counsel.

In the case of *Smith v. Town of Flora, 64 Ill. 95*, cited in defendant's brief, pp. 20 and 21, and largely quoted from as showing how an acceptance will be *im-*

plied, there was clear and positive evidence of acceptance, for in the opinion in that case, p. 96, the court says: "The acceptance is absolutely proved; for sixteen "years the railroad used the ground," etc.

Counsel for defence seem to confuse what courts say concering *intention to dedicate,* with *dedication itself.* Acceptance is a necessary part of the latter question, but is no part of the former.

The doctrine quoted from *Child v. Chappel, 5 Selden 257* (defendant's brief, p. 22), is mere *dictum,* unsupported either by any other cases, or by the facts in that case. It seems that the question there was between the dedicator and a purchaser of lots abutting on a public wharf, as public wharf property.

The court there says: "It is perhaps unnecessary to "consider whether such a grant as between grantor and the public would be a dedication. I think it would not. The dedication is not complete until accepted by the public by user or some other indication of acceptance" (*5 Selden 257.*)

As against the dedicator and in favor of the private owner of abutting property an estoppel was sustained.

Respectfully submitted,

R. B. Waite

Counsel for Plff in Error.

[1042.]

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1878.

JOHN RUCH,

vs.

THE CITY OF ROCK ISLAND.

Error to the Circuit Court of the United States for the Northern District of Illinois.

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

W. C. GOUDY,
For the Defendant in Error.

HORACE O'DONOGHUE, LEGAL PRINTER, 61 BRYAN BLOCK, 170 La Salle st.

[1042.]

Supreme Court of United States.

OCTOBER TERM, A. D. 1878.

JOHN RUCH,

vs.

THE CITY OF ROCK ISLAND.

Error to the Circuit Court of the United States for the Northern District of Illinois.

STATEMENT OF CASE.

This is an action of ejectment brought by plaintiff in error, to recover three-eighths of a square or block of ground in the city of Rock Island, Illinois, known as "Union Square." The tract of land of which the premises in controversy are a part, was laid out in May, 1836, by John W. Spencer and Jonah H. Case, the then owners thereof, as an addition to the town of Stephenson, now city of Rock Island, which is now known as Spencer &

Case's Addition. Said addition was duly platted and recorded, as required by the statute of the State of Illinois. A plat thereof is shown on page sixteen (16) of the record, and on page eight (8) of the transcript herein. It is conceded, on the part of the defendant in error, that the plaintiff in error showed record title in himself to the premises, and is entitled to recover, unless the defense made has been established.

The defense is, that Spencer and Case, in their lifetime, dedicated the whole block of which the premises in controversy are a part, to the public by general dedicataion.

This, the only point in the case, was very tersely and prominently put to the jury by the learned Judge who tried the cause, in several parts of his charge: On page thirty-three (33) of the record will be found this language of the Court: "These facts and conveyances would clothe the plaintiff Ruch with the legal title to three-eighths of the said square of land and entitle him to recover in this action unless you are satisfied from the evidence in this case, that said Jonah H. Case dedicated this parcel of land to the public as a public square, during his lifetime." (Transcript, p. 12.) Again, on the same page, "The main question in this suit is, did the said Case and Spencer dedicate said square to the public, as a public square, during Case's lifetime? Whether said dedication was made or not, is a question of fact to be determined by you, from the evidence in this case." Again, on page forty-seven (47) of the record: "I will then say, in conclusion, gentlemen, that unless a general dedication to the public use is made out by the proof in this case,

then the plaintiff is entitled to recover." (Transcript, p. 7.)

This suit was brought to the December Term, 1868; and, prior to the Chicago fire of 1871, was tried before DRUMMOND, Justice, and a jury, and a verdict rendered for the defendant. The plaintiff took a new trial under the statute of Illinois allowing a new trial on payment of costs. (Record, p. 4.) The record and files of the cause being destroyed in that fire, the papers, by stipulation, were reproduced and the cause redocketed. (Record, p. 4.) The cause was tried a second time before BLODGETT, Justice, and a jury, at the October term, 1875, and again resulted in a verdict and judgment for the defendant. (Record, p. 13.) To reverse which judgment, this writ of error is prosecuted.

The plaintiff in error assigns for error the following:

1. That the Court below erred in admitting improper and incompetent evidence on behalf of the defendant below.

2. That said Court erred in refusing to give to the jury certain specific instructions asked by counsel for plaintiff below.

3. That the Court erred in its charge to the jury on the trial.

4. That the verdict and judgment are against the law and the evidence, and that the Court erred in not setting the same aside.

These also are the points presented by the plaintiff in error, in his argument in this court; and which we propose to consider *seriatim*.

BRIEF OF ARGUMENT.

I.

The first exception by plaintiff in error, is as to the competency of certain evidence, and has reference to the testimony of Connolly and Harson, who deposed to the contents of the deposition of Henry Powers, which was taken prior to and read on the first trial, the said Powers having subsequently departed this life, and his deposition having been destroyed in the Chicago fire of 1871.

Defendant's counsel submits that this testimony was entirely proper and competent for the purpose for which it was admitted. Authorities :

U. S. vs. White, 5 Cr. C. C., 457.
U. S. vs. Macomb, 5 McLean, 286.
Barnett vs. The People, 54 Ill., 325.
Iglehart vs. Jernegan, 16 Ill., 513.
Starkey vs. The People, 17 Ill., 23.
Mineral Point R. R. Co. vs. Keep, 22 Ill., 19.
Mayor of Dorchester vs. Day, 3 Taunton, 261.
Miles vs. O'Hara, 4 Binney, 108.
Cornell et al. vs. Green, 10 Serg. & Rawle, 14.
Chess vs. Chess, 17 Serg. & Rawle, 469.
Bollinger vs. Barnes, 3 Devereaux, (N. C.) 460.
Montgomery vs. The State, 11 Ohio, 424.
Nelson vs. The State, 13 Smeade & Marsh, 500.
1 Greenleaf on Ev., p. 200, Sec. 165
2 Russell on Crimes, p. 683.
Bowie vs. Neale, 5 Harris & Johns., 226.
Wolf vs. Wyeth, 11 Serg. & Rawle, 149.

II.

To the second point made by plaintiff in error—that the Court erred in refusing to give certain specific instructions asked by plaintiff in error—the counsel for defendant in error respectfully submits that the instructions given by the Court fully and fairly presented to the jury the law of the case, and, that being done, it is sufficient, and no error has intervened. The court below was not required to give *totidem verbis* instructions as asked by either party.

Authorities:

T., W. & W. Ry. Co. vs. Ingraham, 77 Ill., 313.
Stowell vs. Beagle, 79 Ill., 526.
Gundt vs. Hartranft, 41 Ill., 10.
Ill. Central R. R. Co. vs. Swevringen, 47 Ill., 206.
Viner vs. Cover, 55 Ill., 391.
Northern Line Packet Co. vs. Binninger, 70 Ill., 572.
Lawrence vs. Hogennon, 56 Ill., 76.
Moginac vs. Thompson, 7 Peters, 390.
Clymer's Lessee vs. Dawkins, 3 Howard, 688.
Kelley vs. Jackson et al., 6 Peters, 622.

III.

To the third point made by plaintiff in error, viz.: that the Court erred in its charge to the jury on the trial, it will be sufficient to reply—

1. That no specific objection or exception was taken to any part of the charge at the time it was given.

The exception being general to the whole charge , is not such as the Court was required to notice.

See rule four (4) of this Court.

2. The charge of the Court as a whole fully and fairly presented the case to the jury.

Authorities cited under point II.; and see, also—

Marcy vs. Taylor, 19 Ill., 636.
Washburn on Easements and Servitudes, pp. 187, 188.
Child vs. Chappell, 5 Selden, 257.
City of Cincinnati vs. White's Lessee, 6 Peters, 431.
Hunter vs. Trustees of Sandy Hill, 6 Hill, 407.
Godfrey vs. The City of Alton, 12 Ill., 33.
Warren vs. The President and Trustees of the Town of Jacksonville, 15 Ill., 236.
Monley et al vs. Gibson, 13 Ill., 312.
Waugh vs. Leech, 28 Ill., 488.
Rees vs. City of Chicago, 38 Ill., 322.
Smith vs. Town of Flora, 64 Ill., 95.
City of Chicago vs. Wright, 69 Ill., 319.

IV.

To the fourth and last point made by the plaintiff in error, that the verdict and judgment are against the law and the evidence, it may be replied :

(1.) The record does not present, nor purport to present, to this Court all the evidence in the case.

(2.) If all the evidence were before the Court, it

would not review the same or determine the questions of fact involved in the case.

Authorities:

Schuchardt vs. Allens, 1 Wallace, 371.
Burr vs. Des Moines County, 1 Ibid, 102.
Brown vs. Clark, 4 How, 15.
Barr vs. Gratz, 4 Wheat., 220.
U. S. vs. Daniel, 6 Wheat., 540.
Town of Ohio vs. Marcy, 18 Wallace, 552.
Insurance Company vs. Folsom, 18 Wal., 249.

ARGUMENT.

I.

MAY IT PLEASE THE COURT:

In discussing the questions presented by the plaintiff in error, on his assignment of errors, we propose to consider them substantially in the order of their presentation.

The first exception taken by the plaintiff in error relates to the competency of certain evidence on the part of defendant, admitted by the Court on the trial in the court below. The exception has particular reference to the depositions of Connelly and Harson, by whom was sought to be proved the testimony given by one Henry Powers on a former trial of the cause. It is conceded, as well as shown by the record, that the cause was first tried before DRUMMOND, Judge, prior to the great fire in Chicago, in October, 1871; that on that trial the deposition of said Powers was read in evidence on behalf of the defendant; that by the said fire the record in this cause, including the said deposition, was destroyed, and also that the said Powers shortly thereafter departed this life.

For the purpose of restoring or reproducing the testimony of this deceased witness, the depositions of Connelly and Harson were taken and read on the trial, on behalf of the defendant. Connelly was attorney for the defendant on the first trial of this cause; and, as such attorney, was present at the taking of the deposition of said Powers, propounded the questions, heard the answers thereto, and took notes of the same. He was also present at the first trial, and heard the deposition read. Harson was the commissioner before whom said deposition was taken. Both of said witnesses deposed that they remembered the substance of said Powers' testimony as given by him in said deposition, and from their recollection thereof they each state the substance of said testimony as given by said Powers and contained in said deposition. Said Connelly, in giving his testimony, also made reference to his minutes of said Powers' testimony taken by him at the time, for the purpose of refreshing his recollection. (Record, pp. 21, 22, 41.)

That the testimony given in a cause by a witness who has subsequently died, may be reproduced or subsequently proven in the same cause by the testimony of persons who heard him testify, is too well settled to require discussion, and is conceded by counsel for plaintiff in error, in their brief, but it is claimed by them that only the exact words of the testimony of the deceased witness can be proved, and not the substance thereof.

We submit that the current of authority does not sustain this position, and that it is sufficient to prove the substance of the testimony given by the deceased witness.

In support of the ruling of the Circuit Court on this

point, we respectfully refer the Court to the following authorities:

In 1 Greenleaf on Evidence, p. 200, sec. 165 and notes, where the subject is discussed and the authorities collated, the rule is distinctly stated to be, that it is sufficient for the witness to state the substance of what was sworn to on the former trial, citing a long array of cases in the State and Federal courts.

We cite only a few of the adjudged cases:

Barnett vs. The People, 54 Ill., 325, was an indictment for murder. Upon the second trial of the case evidence was admitted of what a witness had sworn to at the examination of the defendant before the Justice of the Peace. The Court say it is admissible and sufficient to prove the substance of what a deceased witness testified to on a former trial, and the precise words used by the witness need not be proved (p. 330), and such is the rule in both civil and criminal cases. In support of the rule thus announced, the Court refer to the case of *Iglehart vs. Fernegan*, 16 Ill., 513, where the same rule is laid down.

In *Mineral Point R. R. Co. vs. Keep*, 22 Ill., 19, the same rule is approved. In this case the witness reproducing the testimony was one of the plaintiff's counsel. He stated he had, as such counsel, taken down the testimony, and produced his minutes thereof; said he could not state the testimony minutely from recollection, but must rely on his minutes, which he believed to be correct, and then read from his minutes. The Court in its decision pertinently ask, "What better evidence of the testimony of a deceased witness could there be than correct notes of it

taken at the time?" As supporting its decision the Court cites:

Mayor of Doncaster vs. Day, 3 *Taunt.*, 261.
Miles vs. O'Hara, 4 *Binn.*, 108.
Cornell et al. vs. Green, 10 *Serg. & Rawle*, 14.
Chess vs. Chess, 17 *Serg. & Rawle*, 409.
Ballinger vs. Barnes, 3 *Devereaux* (*N. C.*) 460.

In *Cornell vs. Green*, *supra*, the Court criticises the old English rule, which required the precise words to be given, which it characterizes as unreasonable. Under the common-law rule admitting dying declarations in evidence on the trial of an indictment for murder, such declarations may be proven by any one who heard them made, and it is sufficient to prove the substance thereof, without the very words, and such proof can be made even through the medium of an interpreter.

In *Starkey vs. The People*, 17 Ill., 23, the Court say: "A conscientious witness will rarely undertake, under oath, to give the exact words of another, spoken at another time, and on a different and remote occasion. The substance of the words, if the exact words cannot be given, is all the law requires."

City of Montgomery vs. The State, 11 *Ohio*, 424.
Nelson vs. The State, 13 *Smedes & Marsh*, 500.

In *United States vs. Macomb*, 5 McLean, 286, JUDGE DRUMMOND reviews fully the authorities, and also argues the question upon principle in a very able opinion, which entitles the case to be regarded as a leading one, and in which the rule as laid down in the case at bar is emphatically approved.

Further objection is made by plaintiff in error to the testimony of Connelly, that it relates to a deposition as taken, and not as used on the trial; that he testified from his notes and not from recollection, and that he was an attorney in the case.

For answer to the first two points, it is sufficient to state that they are not well taken in point of fact. The record (p. 21) shows that Connelly testified to the taking of the deposition, and that it was used on a former trial of this cause. The record (p p. 21, 41) also shows that the witness testified from recollection, using his notes to refresh his memory. On the other point, we would remark that we know of no principle of law disqualifying a person as a witness, on the ground that he was formerly an attorney in the case.

In view of the authorities quoted, it would seem to us that the witnesses Connelly and Harson, by reason of their relation to and knowledge of the deposition of Powers, were especially well qualified to testify to its contents.

II.

The second point made by the plaintiff in error is, that the Court erred in refusing instructions asked by him. The first instruction so asked is, in substance, that mere acquiescence by Case in an adverse possession by the city would not bar the plaintiff's action, unless such adverse possession had continued for twenty years. It is not easy to conceive how the law on that subject could have been more plainly, tersely, and prominently set before the jury than was done by the Court in its charge.

On page 37 of the record, page 14 of the transcript, the Court charges that the law of Illinois unequivocally requires twenty years' adverse possession to bar a recovery, where there has been no act of the owner affirmative of a dedication. Again, on page 38 of the record, page 14 of the transcript, the Court say : "If the public, without the consent of the owner, enter into the possession of his land, and he simply acquiesces in it, and there is no overt or affirmative act on his part, then the possession must continue for twenty years." It is submitted, that the instructions thus given to the jury were more favorable to the plaintiff than those asked by him, and present no ground for objection on his part.

The third instruction asked by plaintiff in error was properly refused by the Court in the terms in which it was asked, for the reasons, if for no other, that it assumes that the defendant did not take possession of the premises until some time after 1842, which is not true in point of fact ; and it further assumes that the only way in which the defendant could accept the dedication, was by taking possession, which is likewise incorrect.

The only important act to be done on the part of the defendant was acceptance, and that might be and was done by the public authorities, by the continuous exemption of the premises from taxation, and by keeping the same open for the use of the public. These acts followed immediately after the dedication, and were the only ones which at that early period could have been necessary or requisite for indicating the public acceptance of the square for its use. The question was one of fact, and was fairly submitted to and passed upon by the jury. If the jury were satisfied that a general dedication was made by Case

and Spencer in 1836, and that the same was then accepted by the defendant, then no acts or declarations of Case in 1855, or at any other time subsequent to such dedication, could defeat or limit the dedication thus made.

The substance of plaintiff's fourth instruction was fully and fairly given to the jury in the Judge's charge, as follows :

" An express dedication is usually made either by a " deed, or by such express, unequivocal, and affirma- " tive acts as show the intention of the party to make the " dedication." And again, " when such dedication, made " by express acts and declarations, was accepted by the " public, it became binding on Mr. Case."

The fifth, seventh and eighth instructions, as asked by the plaintiff, present the question of a special dedication for the purposes of churches and schools, and may be considered together. On this subject the Court instructed the jury as follows :

" Much had been said, or something has been said, in " the course of the trial of this case, in regard to a special " and general dedication. There is little distinction in the " law between them. In one, a dedication may be more " broad and comprehensive than in the other ; but that is " about all the distinction there is. For instance, a man " may dedicate a piece of land for the purchase of a church, " or a school house, or a court house. Then the public " have no right to use it for any other use than the specific " purpose under which he makes the dedication or grant. " But if a man sees fit to donate a piece of land to the pub- " lic as a public square generally, or for general public " uses, then the public have a right to use it in a more

" extended and a more general way than in a special " dedication to which I have referred. And that is the " only essential distinction between a special and a general " dedication.

" The public are at liberty to take from a private " owner, if he sees fit to donate to the public for the " purpose, land for any of the general uses which the pub- " lic, as such, have any occasion to use land ; such as for " parks, public grounds, court houses, churches, public " buildings of any character, and for highways or streets ; " and for these general purposes they may hold and use, " and own the land. Whenever the public ceases to use " the property for the purpose for which it was dedicated, " then the right of the public ceases, and the title reverts." (Record, pp. 35, 36.)

The Court further instructs the jury : " Unless a " general dedication to the public use is made out by the " proof in this case, then the plaintiff is entitled to re- " cover." (Record, p. 47.) This last instruction is, in substance, several times repeated in the body of the charge.

These instructions, we submit, fully and fairly present to the jury the question whether the dedication was general or special in its character.

The sixth instruction as asked, directs the jury to consider the acts of the City Council of Rock Island in purchasing of the Methodist church and of Spencer, and of attempting to purchase of the School Trustees, as bearing on the question whether there had been a general dedication by Case previous to 1855. The instruction as asked was not proper, and so far as proper was embodied

in the charge of the Court. The defendant relied upon a dedication claimed to have been made by Case by express acts and declarations of his, made several years previous to 1855. How this position could be rebutted by proof of acts between the City Council and others in 1855, and to which Case was not a party, we fail to perceive. Besides, the dedication, if made, was made to the public and not to the City Council. Upon the subsequent organization of the City Council it became the trustee for the general public, and, as such, it might preserve and improve the square for the public use, but it had no power or authority to modify or limit the dedication, or by any act to change or impair the effect or validity of the previous acts of the proprietors in making the dedication.

As such trustee they might well purchase the claims of other parties, whether valid or not, or contract with persons having temporary occupation of parts of the block for their removal therefrom, that the square might be occupied for other purposes.

There might also have been other reasons for the purchase from these parties, which had no application to Mr. Case.

It will further be observed by the Court, that the act of the City Council in purchasing from Spencer is evidenced by the deed from Spencer to the city, made in 1855, almost twenty years after the addition was laid out (record, p. 28), and which deed recites that it is made "in consideration that it was the express intention of the proprietors of Spencer and Case's Addition to the town of Stephenson (now city of Rock Island), when the said addition was laid out as such, that the block described should be dedicated to the public for the use of the public."

This deed was offered in evidence by the plaintiff, and admitted by the Court, and, on application of the plaintiff, the jury were by the Court instructed that the recital in the deed of the consideration was not to be regarded by them as evidence against Case.

The Court also instructed the jury, in this connection, that it was their duty to consider these conveyances with the other testimony, as tending to throw light on the intention of Mr. Case in regard to the purposes to which this block was to be applied; and further, that it was their province to weigh all the evidence and determine whether, when taken all together, a dedication to the public had been made out. To all which the plaintiff certainly ought not to complain, inasmuch as he obtained the benefit of so much of his own testimony as he considered favorable to him, without being held to that portion which clearly operated against him.

Yet, in view of the other evidence bearing on the subject, it is hardly to be presumed, in the absence of any evidence to that effect, that the original acts and intentions of Case as to dedication differed in anywise from those of Spencer.

Upon a review of the charge of the Court below, we are persuaded that this Court will find that the law of the case was therein fully and correctly given to the jury, and embraced all the points asked by the plaintiff, which ought to have been given, and that no error has intervened. It is well settled that the Court below was not required to give *totidem verbis* instructions as asked by either party.

We respectfully refer the Court to the authorities cited under this head of our brief, without reproducing them here.

III.

To the third point made by the plaintiff in error, viz.: that the Court below erred in its charge to the jury on the trial, it may be replied.

1. That no specific objection or exception was taken to any portion of the charge at the time it was given. This appears affirmatively by the record (p. 48), which states as follows: "To which charge of the Court no "exception was taken, except as to the refusal of the Court "to give the instructions as asked, and to all of such charge "inconsistent with the said instructions asked for by "plaintiff's counsel."

This is clearly not such an exception as the Court below was required to notice. Upon this point we need only refer the Court to rule 4 of this Court, which provides:

"Hereafter the Judges of the Circuit and District "Courts shall not allow any bill of exceptions which shall "contain the charge of the court at large to the jury in "suits at common law upon any general exception to the "whole of such charge. But the party excepting shall "be required to state distinctly the several matters of law "in such charge to which he excepts, and such matters of "law, and those only, shall be inserted in the bill of excep-"tions and allowed by the Court."

2. In considering the instructions of the Court, counsel for plaintiff in error discuss the questions arising

on the second and third errors assigned, together under the same head. Having said all we desire upon plaintiffs second point relating to the specific instructions asked by him, and to avoid unnecessary repetition, we propose to confine ourselves to a brief consideration of the instructions as given by the Court, which we shall endeavor to show are correct in principle and sustained by the authorities. The main question presented in the case and embodied in the charge is that of a dedication—what acts are necessary to constitute a dedication to and an acceptance thereof by the public.

The subject is discussed in Washburn on Servitudes and Easements, ch. 1, sec. 5, p. 178, *et seq.*, where the following principles are stated: A dedication of land to the public implies an appropriation of it by the act of the owner, for the use and benefit of the public, without any formal and specific contract between them. To constitute a dedication of land to public use, there must be an intention to do it on the part of the owner, which intention must be satisfactorily proved. It may be manifested by writing, by declaration, or by acts. Dedications have been established in every conceivable way by which the intention of the party could be manifested. They are of two kinds, expressed and implied. An express dedication is manifested by some affirmative act on the part of the owner, showing an intention to make the dedication. A dedication may be implied without any express act on the part of the owner, but from an acquiescence of the owner in the use of the land by the public. The doctrine is well established, that a dedication of real estate to public use may be made by mere verbal declarations, accompanied with such acts as are necessary for that pur-

pose. And it is every day's practice to presume a dedication of land to the public use, from an acquiescence of the owner in such use. All sorts of easements and rights to enjoyment of land, whether for use or of pleasure, which may be acquired by an individual by grant or prescription, may also be acquired by the public by actual dedication. To constitute a dedication requires no grant or conveyance by deed or writing on the part of the owner of the land. If he shall do such acts *in pais* as amount to a dedication, the law regards him as estopped, *in pais*, from denying that the public have a right to enjoy what is dedicated, or from revoking what he had thus declared by his acts. And there may be a dedication to the use of a town before it shall have been actually incorporated, or it may be to the public—a body not capable of taking a grant—the only limit being that what is dedicated is suited to the wants of the community at large; and a dedication, when once made to and accepted by the public, is in its nature irrevocable. No length of time is requisite to effect a dedication, it depending on the nature of the act by which it is made. If the act of dedication be unequivocal, it takes place immediately.

The dedication is rendered complete by the acceptance of the public. As to what shall be an acceptance depends upon the circumstances of the particular case; it may be by official recognition, by public use, or other indication of acceptance. As a rule of wisdom the acceptance of a dedication of land for public use may be presumed from the beneficial nature of the dedication. We quote from a few of the adjudged cases on the subject.

Marcy vs. Taylor, 19 Ill., 636, was a suit in trespass

quare clausum fregit. The defense was that the premises had been dedicated as a public road. The Court below gave the following instruction for the plaintiff :

"That to constitute or establish a public road by dedication, it is necessary that the owner grant the land to the public for that purpose, and that it has been accepted by the commissioners, recognized by them, and worked and kept in repair by them and others whose duty it was to repair public roads."

The Supreme Court of Illinois hold the instruction erroneous, and say :

"A dedication for a highway may be proven in "various ways. It may be established by a written grant, "by long and uninterrupted user, or by the acts and dec- "laration of the owner ; but, to be availing, it must be "with intent to dedicate. It seems to be well settled, that "no particular time is necessary for evidence of dedication. "If the act of dedication be unequivocal, it may take "place immediately. When it is dedicated to the public "and accepted by them, it then becomes a highway. An "acceptance may be shown by user by the public, as by "travel, or by the acts of the public officers in repairing "and keeping it up. But it cannot be essential to the "acceptance that they should repair the road, for it might "never require repairs. Any other act on the part of the "public which manifests an intention to accept is as satis- "factory evidence of acceptance as repairs by the officer."

In *Smith et al. vs. Town of Flora et al.*, 64 Ill., 95, it is held by the Supreme Court of Illinois as follows :

"It is not necessary, to constitute a dedication, that

"there should be a grant in writing. It may often be to "the use of an incorporated town or to the public—a body "incapable of taking by grant; and in such case there "could be no writing to manifest the intention. When a "party owning lands shall do such acts *in pais* as amount "to a dedication, he is estopped from a denial of the right "to enjoy what has been thus dedicated; and when made "and accepted by the public it is irrevocable. Dedica- "tions may be proved in every conceivable way: by survey "and plat alone, by grant, by user, and by the acts and "declarations of the owner." (citing *Godfrey vs. The City "of Alton*, 12 Ill., 29; *Marcy vs. Taylor*, 19 Ill., 634).

"They may be shown by matter *in pais*, consisting of "the acts and accompanying declarations of the owner, "and acceptance may be proved by the user of the public "or by the acts of officers. They may be inferred from "length of user and acquiescence by the owners. Acqui- "escence by the owner will estop his grantee from a "denial" (citing *Demon vs. The People*, 17 Ill., 416; *Rees vs. The City of Chicago*, 38 Ill., 322).

The facts in this case were, in several particulars, similar to those in the case at bar. There was a town plat with the lots laid out abutting on a vacant space claimed by a railroad as a right-of-way, on each side of which right-of-way strips of ground were left. At the time of the survey one of the owners declared that the reservation was for the use of the public, and the surveyor testified that it was the general understanding that the space was left for the benefit of the public. Numerous lots were sold by the proprietors with reference to the plat, and the houses erected generally had their fronts on the vacant ground. For ten years there was an acqui-

escence in the plat, and no taxes were paid by the original owners. The Court say: "The sale of lots by the plat, "the long acquiescence, the non-payment of taxes, the "utter neglect of the property for so many years, clearly "indicate the adoption of the plat by the owners."

In *Child vs. Chappel*, 5 Selden, 257, it is held (MORSE, J.) that an occupation by the public such as to render a dedication complete may be by public user or other indication of acceptance, and that, as a rule of wisdom, the acceptance of a dedication of land for public use may be presumed from the beneficial nature of the dedication.

"If the owner of a tract dedicate it to public use as "an open square for the convenience and accommodation "of the inhabitants of a city, the public acquire a vested "right to its possession for such use. To constitute such "dedication the legal title need not pass from its owner, "nor is it necessary that any grantee of the use should be "in existence; all that is required is the assent of the "owner to the use, and the actual enjoyment thereof for "such length of time that the public accommodation and "private rights might be materially affected by an interruption of the enjoyment."

Brightley's Fed. Dig. Tit. "Dedication," §§ 8, 9.
Cincinnati vs. White, 6 Pet., 431.
McConnell vs. Lexington, 12 Wh., 582.
New Orleans vs. United States, 10 Pet., 662.
Sargeant vs. Bank of Indiana, 4 McL., 339.
Waugh vs. Leech, 28 Ill., 488.
City of Chicago vs. Wright, 69 Ill., 319.

Counsel for plaintiff in error, in their brief (page 30)

refer to a statute of Illinois, which provides that when a plat or map is made out, certified, acknowledged and recorded, as required by the act, such plat or map shall operate as a conveyance in fee simple of all such parcels of land as are therein expressed, to the public use; and claim that inasmuch as the plat in this case did not follow the statutory requirements, it is therefore to be inferred that the square in question was not intended for public use.

It has been held, however, in numerous cases, that a dedication of lands to public use is not dependent upon or affected by the provision of the statute. Thus in *Manly et al. vs. Gibson, 13 Ill., 308, 312*, it is held:

"That the public may have an interest in streets and alleys, although the ground has not been set apart for the purpose in the manner prescribed by statute. A dedication of ground to public uses may be made in other ways than by the making and recording of a town plat."

In *Banks vs. Ogden*, 2 Wallace, 57, this Court hold that—

"A plat of an addition to a town not executed, acknowledged, and recorded in conformity with the laws of Illinois, operates in that State as a dedication of the streets to public use, but not as a conveyance of the fee of the streets to the municipal corporation."

To the same effect are the cases of *I. B. & W. R. R. Co. vs. Hartley, 67 Ill., 439; Gebhardt vs. Reeves, 75 Ill., 301*.

In the case at bar, the evidences of dedication and

acceptance have already been commented upon, and are so fully set forth in the record, and the charge of the Court, that any further reference thereto is deemed unnecessary.

IV.

The fourth error assigned is, in effect, simply that the Court overruled the plaintiff's motion for a new trial. We submit that error cannot be assigned on such ground. That this Court will not review the evidence for the purpose of determining whether the verdict is in accordance with the weight of testimony or not. The Court could not do so in this case, for the reason that the record does not present nor purport to present all the evidence in the case, and consequently it would be impossible for this Court to determine where the preponderance rested; but we regard it as the established rule of this Court, that it would not, if the evidence were before it, review the same or determine the questions of fact involved in the case.

In Schuchardt vs. Allens, 1 Wallace, 371, this Court say: "It is enough that there was evidence upon the subject proper to be left to the consideration of the jury."

"If the jury erred, the remedy was by a motion for a new trial, and not by a writ of error. This part of the case was argued as if such a motion were before us. The rules of law which would be applicable in that event are very different from those which apply as the case is presented."

"A motion for a new trial in the courts of the United States is addressed to the sound discretion of the tribunal

which tried the case, and to grant or refuse it cannot be made the subject of exception."

Again, in *Burr vs. Des Moines Co.*, 1 Wallace, p. 102, the Court state as follows: "The statement "of facts on which this Court will inquire if there "is or is not error in the application of the law "to them, is a statement of the ultimate facts or "propositions which the evidence is intended to establish, "and not the evidence on which those ultimate facts are "supposed to rest. The statement must be sufficient in "itself, without inferences or comparisons, or balancing "of testimony, or weighing evidence, to justify the appli- "cation of the legal principle which must determine the "case. It must leave none of the functions of a jury to "be discharged by this Court, but must have all the "sufficiency, fullness, and perspicuity of a special verdict. "If it requires of the Court to weigh conflicting testimony, "or to balance admitted facts, and deduce from these the "propositions of fact on which, alone, a legal conclusion "can rest, then it is not such a statement as this Court "can act upon."

It ought to be some evidence of the correctness of the judgment in this case, that two trials have been had: the first before Judge Drummond and a jury, which resulted in a verdict for the defendant; the second before Judge Blodgett and a jury, with the same result, and upon a motion for a new trial thereon being made, the same was over-ruled.

The defendant in error, in its capacity as trustee for the public, having for upwards of thirty years previous to the commencement of this suit, possessed and controlled

the premises in question as a public square, under the dedication claimed, without opposition or objection, and its right thereto having been determined in its favor by two independent verdicts and adjudications thereon, it now respectfully submits its rights to this Court for its affirmance.

W. C. GOUDY,

For the Defendant in Error.